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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL ACADEMY OF SCIENCES,

PETITIONER,

v.

ANIMAL LEGAL DEFENSE FUND, PSYCHOLOGISTS FOR THE ETHICAL TREATMENT OF ANIMALS, AND ASSOCIATION OF VETERINARIANS FOR ANIMAL RIGHTS,

RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a committee that is formed by a private corporation such as the National Academy of Sciences to assist it in performing a federal grant, and that is neither managed nor controlled by a federal agency, is a "utilized" committee within the meaning of the Federal Advisory Committee Act, 5 U.S.C. App. II.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following persons were parties in the court of appeals: Donna Shalala, Secretary of the Department of Health and Human Services; the Department of Health and Human Services; Dan Glickman, Secretary of the Department of Agriculture; the Department of Agriculture; Philip Lee, Director of the Public Health Service; and Harold Varmus, Director of the National Institutes of Health.

The National Academy of Sciences is a private, non-profit corporation with no parent or subsidiary companies.

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The National Academy of Sciences petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 104 F.3d 424. The opinions on the denial of rehearing *en banc* (App., *infra*, 38a-41a) are not yet reported. The opinion and order of the district court (App., *infra*, 15a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1997. Petitions for rehearing were denied on May 6, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutes are set forth at App., *infra*, 42a-60a.

STATEMENT

1. The National Academy of Sciences ("NAS") is an institution with a worldwide reputation for preeminence in all fields of science. NAS was incorporated in 1863 by some of the country's most distinguished scientists of that era, including Louis Agassiz of Harvard and Benjamin Silliman of Yale. *See* 36 U.S.C. § 251. Today, NAS has a budget of approximately $180 million, which it generates in substantial part by producing annually more than 200 reports for a variety of entities including, principally, federal agencies, as well as state and private bodies.

Typically, as in this case, a federal agency obtains NAS' expert views by entering into a contract, grant, or cooperative agreement with NAS for the preparation of a written report. C.A. App. 181.[1/] NAS then establishes a committee of volunteer experts that, with assistance from NAS' staff, prepares a draft report. *Id.* Although the committee plays an important role in completing the project, NAS itself retains full responsibility for performance of the work. *Id.* at 180-81.

NAS exercises its ultimate control over the work through a stringent, internal peer-review process. *Id.* at 187. This review process "is regarded as an essential safeguard in maintaining a high standard for [NAS] reports and lends credibility to the approved manuscript." *Id.* at 194. To ensure independence from external pressures and to guarantee the most candid exchanges concerning points of disagreement, the entire process is kept confidential, *id.* at 189, with only the resulting final reports made available to the public and the sponsoring agency. *See Herbert v. National Academy of Sciences*, 974 F.2d 192, 193 (D.C. Cir. 1992) (NAS refused to issue report because of dispute between peer reviewers and committee over draft report).

For decades, this combination of independence and confidentiality has ensured that the results of the NAS' reports are accepted universally as apolitical, unbiased analyses of scientific issues. This method also has guaranteed that the work product of the NAS is of unquestioned quality.

2. From time to time, the NAS has issued *The Guide for the Care and Use of Laboratory Animals ("Guide")*,

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[1/] "C.A. App." refers to the joint appendix in the court of appeals.

a widely accepted scientific manual, the "primary purpose" of which is "to assist scientific institutions in providing professionally appropriate care for laboratory animals." C.A. App. 46, 47. The *Guide* has been distributed in the United States and abroad to almost 400,000 investigators, members of institutional animal care committees, veterinarians, and members of the public. *Id.* at 159.

In 1991, NAS proposed to revise the *Guide* and submitted a grant proposal to the government. App., *infra,* 3a. Following award of the grant, NAS selected and appointed members of the Guide Revision Committee to assist in the work. *Id.* A draft of the *Guide* was prepared without any management or control by federal officials, *id.* at 5a; the draft was subjected to NAS' confidential peer-review process; and the revised *Guide* was issued by NAS in January 1996.

3. a. In 1994, the Animal Legal Defense Fund and other animal-rights organizations (hereinafter "ALDF") filed suit against the sponsoring federal agencies, contending that the Guide Committee was "utilized" by a federal agency and therefore was required to comply with the applicable requirements of the Federal Advisory Committee Act ("FACA"). NAS intervened as a defendant. The district court denied preliminary injunctive relief, finding no likelihood of success on the merits. C.A. App. 320-345.

b. ALDF's appeal from the denial of its request for a preliminary injunction was dismissed as moot because the Guide Committee had conducted its final meeting while the appeal was pending. *ALDF* v. *Shalala*, 53 F.3d 363 (D.C. Cir. 1995). Because other relief sought by ALDF (such as access to certain Committee records) would still be available, the court of appeals held that the case continued to present a live controversy, and it remanded to the district court for consideration of the merits. *Id.* at 366-67. Judge Wald

concurred in the result, concluding that the appeal was not moot, but agreeing with the district court that ALDF had failed to demonstrate a likelihood of success on the merits. *Id.* at 367-69.

c. On remand, the district court granted summary judgment to the federal defendants and NAS, holding that the Guide Committee was not "utilized" by the federal defendants within the meaning of Section 3 of FACA. App., *infra*, at 15a-34a. The district court observed that the court of appeals, in prior cases, had described the word "utilized" in FACA as "'a stringent standard, denoting something along the lines of *actual management and control* of the advisory committee.'" *Id.* at 23a-24a (citation omitted; court's emphasis). The court concluded that there was no evidence of such management and control here. *Id.* at 25a-27a.

In response to ALDF's argument that this Court in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989), had created a different "test" for the term "utilized" in the case of a committee formed by a "quasi-public" entity, the district court specifically found that NAS is not a "quasi-public" organization. App., *infra*, 31a-34a. In making this finding, the court stated that it had the benefit of full briefing on NAS' status and pointed to a number of facts, "many of which may not have been before the Supreme Court in *Public Citizen*, evidencing the private nature of [NAS]." *Id.* at 33a. The Court stressed the following (*id.* at 32a, 33a):

- "[T]he government has no seats on the [NAS'] board, and has no voice in choosing the officers or appointing the members of its committees."

- "[T]he IRS recognizes the [NAS] as a Section 501(c)(3) organization, 26 U.S.C. 501(c)(3), and has described it as a 'non-governmental corporation.'"

- "Congress has recognized the [NAS] as a 'private corporation established under Federal law' 36 U.S.C. § 1101. "

- "[A]ll government funds provided to the [NAS] are awarded pursuant to contracts, grants and cooperative agreements, which require the [NAS] to perform particular studies or research projects in exchange for such funds."

- "The fact that the [NAS] was chartered by Congress is insignificant because in 1863, when Congress issued NAS its corporate charter, Congress exercised exclusive power over all acts of incorporation in the District of Columbia, so even run-of-the-mill private corporations were chartered by Congress."

d. The court of appeals reversed. App., *infra*, 1a-14a. The court read this Court's decision in *Public Citizen* to define a "utilized" committee as including a committee created by a "quasi-public" entity, regardless of government management or control. App., *infra*, 7a-8a. Pointing to language in *Public Citizen* that refers to NAS, the court held that NAS is a "quasi-public" entity and thus its committees are "utilized" committees. *Id.* at 7a, *citing Public Citizen*, 491 U.S. at 460. Without questioning the factual underpinnings of the district court's finding that NAS is not a "quasi-public" entity, the court of appeals simply rejected that finding, stating that "quasi-public does not have an independent meaning divorced from the Court's reference in *Public Citizen*." App., *infra*, 10a.

e. Judges Wald and Tatel dissented from the denial of rehearing *en banc*, noting that "this is a case of major consequence, affecting as it does the transparency of the

deliberations and the procedures of hundreds of committees set up under the auspices of the National Academy of Sciences." App., *infra*, 41a. They further noted that "the issue of statutory construction is a close and difficult one not necessarily controlled by the admittedly relevant dicta contained in" *Public Citizen*. *Id.*

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the proper scope of FACA. Because the court of appeals thought that the question of the NAS' status under FACA was decided in *Public Citizen*, and because there is virtually no chance that any other court of appeals will be confronted with the issue, review by this Court is essential to permit NAS to receive a full and fair adjudication of this issue. Moreover, the holding that NAS committees are "utilized" by federal agencies, and therefore required to comply with the myriad burdens of FACA, is wrong because it is at odds with the intent of Congress, as reflected in the statutory language and the other relevant evidence of Congress' purpose.

The term "utilize" means "to make use of," and connotes the exercise of active control; the court of appeals conceded that the Guide Committee here was not subject to such control by the sponsoring federal agencies. App., *infra*, 5a. Moreover, the legislative history confirms that committees formed by the NAS pursuant to contractual arrangements with the government are not covered by FACA.

The application of FACA to NAS committees will have a grievous impact. The independence of the NAS process will be undermined because FACA requires that an officer or employee of the federal government shall chair or attend each meeting, that this official shall have the power to adjourn meetings, and that meetings cannot even be held except at the

call of, or with the advance approval of, the government. FACA § 10(e), (f). FACA thus will insert the federal government into the middle of NAS' operations. The confidentiality of the NAS' deliberations will be compromised because FACA requires that meetings must generally be open, and that the records, reports, working papers, drafts, and other documents which were made available to or prepared for or by each committee must generally be available for public inspection. *Id.* § 10(a), (b), (d). Finally, FACA imposes administrative burdens that otherwise would not apply, such as the advance governmental approval of charters, and publication of timely notice of meetings in the Federal Register. *Id.* §§ 9(c), 10(a)(2).

The decision below could affect as many as 450 current committees that were formed by NAS to assist it in providing services to the government pursuant to federal contracts or grants. As noted, if these NAS committees are subject to FACA, they will be transformed from internal committees of NAS, an entity independent of the federal government, to federally controlled committees.

The ultimate impact of the court of appeals' holding, however, will reach far beyond NAS. A key element of the value of NAS studies is the credibility of NAS with the government and the general public. That credibility is based both on NAS' commitment to quality and objectivity in its work and on NAS' independence from government and the political considerations that can influence government decisionmaking. The NAS prepares high-quality reports based on science, not politics, and these reports have often provided the foundation for informed public debate on important public issues.

A sampling of recent NAS projects confirms the point. In addition to the *Guide*, NAS reports issued or studies

undertaken in the last year have addressed the following issues: (1) the role of cryptology in securing the information society; (2) the possible health effects of exposure to residential electric and magnetic fields; (3) the health consequences of service during the Persian Gulf War; (4) the means to combat brucellosis among bison in the greater Yellowstone area; (5) the marking, rendering inert, and licensing of explosive materials; (6) the control of nuclear weapons materials in the former U.S.S.R.; (7) the international transfer of scientific data over the internet; and (8) the economic, demographic, and fiscal effects of immigration.[2/]

Those studies, and many others too numerous to mention, all relate to issues that have generated and will generate important public debates, and that could create serious political divisions. The ability of one institution of unquestioned integrity to provide politically unbiased and scientifically sophisticated analyses relevant to these and myriad other issues is, by itself, a matter of national importance.

In short, if NAS were forced to cede control of its own committees to management by government officials, the

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[2/] For discussion of the significance of some of these reports, *see, e.g.*, "White House Challenged on Data Security," *N.Y. Times*, May 31, 1996, at D2, col. 1; "Power Line Hazard Called Small," *Washington Post*, Nov. 1, 1996, at A1; "Research on Gulf War Illness Criticized," *USA Today*, Oct. 10, 1996, at 10A; "Babbitt Calls for Study, Seeks Bison-Killing Halt," *Washington Times*, Mar. 18, 1997, at A9; "NRC Panel Enters the Fight Over Tagging Explosives," *Science*, Jan. 24, 1997, at 474; "Copyright Treaties Threaten Information Flow, Says NRC," *Nature*, Apr. 17, 1997, at 635; "Academy's Report Says Immigration Benefits the U.S.," *N.Y. Times*, May 18, 1997, at A1, col. 4.

credibility of NAS' work would be compromised and the value of its studies for the government and the public would be greatly diminished. The potential impact of this result on the NAS' ongoing work and, most importantly, on the ability of the government and the public to continue to obtain independent studies and analyses from NAS justifies review by this Court.

I. The Court of Appeals' Holding Is Contrary To This Court's Approach To Statutory Construction.

This case presents an important issue of statutory construction under FACA. The court of appeals' decision, unless overturned, would expand the coverage of FACA beyond the scope intended by Congress. All future cases raising the applicability of FACA to specific NAS committees will almost certainly be brought in the District of Columbia, where NAS is located and where the court of appeals' ruling will be controlling. Thus, there is no realistic possibility that a circuit conflict will develop, and review should therefore be granted now to resolve this question, which has enormous implications for NAS' future operations and for the government's ability to make policy with the benefit of the highest quality analyses of scientific issues.

The court of appeals' decision is at odds with settled principles of statutory construction. Instead of focusing on the meaning of the world "utilized" in FACA, the court below held that this Court in *Public Citizen* established alternative "prongs" for the interpretation of "utilized," one of which applies solely to committees formed by "quasi-public" entities. App., *infra,* 12a, 13a. But the term "quasi-public" appears nowhere in FACA or its legislative history.

This Court has repeatedly emphasized that the first, cardinal rule of statutory construction is to begin the inquiry

by examining the plain meaning of the statutory language. *See, e.g., United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989); *Russello v. United States*, 464 U.S. 16, 20 (1983). The word "utilize" means to "make use of"; it is thus synonymous with the verb "use." *Webster's Third New International Dictionary* 2525 (1993). It is this meaning that should guide the interpretation of the statute.

In *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501, 506 (1995), the Court examined the "ordinary or natural" meaning of the word "use" that appears in 18 U.S.C. § 924(c)(1) — a statute governing the "use" of a firearm during any crime of violence or a drug trafficking crime — and concluded that the word means "an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 116 S.Ct. at 505 (emphasis in original).[3/] This meaning of the statutory language clearly connotes actual control of the weapon, and thus strongly supports the district court's interpretation of "utilized" in FACA as referring to a committee that, while not "established" by a federal agency, is subject to "*actual management and control*" by the agency. App., *infra,* 23a (court's emphasis; citations omitted). This interpretation flows naturally from this Court's reasoning in *Public Citizen*, where the Court suggested that the test to

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[3/] Examples given by the Court of "active employment" in the context of that statute include "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire a firearm." *Id.* at 508. In other contexts, a person is generally held to "employ" another only where "the person for whom services are performed has the *right to control and direct* the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished." 26 C.F.R. § 31.3121(d)-1(c)(2) (1996) (emphasis added) (regulations concerning payment of Social Security taxes).

determine whether a group is a "utilized" committee for purposes of FACA is whether the group is "amenable to . . . strict management by agency officials." 491 U.S. at 457-58.

To be sure, the Court in *Public Citizen* described "utilize" as "a wooly verb" which, if "[r]ead unqualifiedly . . . would extend FACA's requirements" beyond the reach intended by Congress. 491 U.S. at 452. Accordingly, the Court looked to FACA's legislative history to assist it in interpreting the term narrowly so as to avoid a serious constitutional question of separation of powers. *See id.* at 465-67. But this Court clearly did not intend to expand the reach of the statute beyond the confines of the word "utilized," which is exactly what the court of appeals has done here.[4/]

Other relevant evidence of Congress' purpose confirms that Congress did not intend to subject NAS committees to the requirements of FACA. In the legislative process that resulted in FACA's enactment, Congress rejected language from the Senate bill that would have covered groups, including some NAS committees, formed pursuant to contractual

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[4/] Moreover, the Court in *Public Citizen* acknowledged, but did not address, an alternative constitutional argument that a sweeping interpretation of FACA also would violate the associational freedoms of the ABA committee members. *Id.* at 466-67 n.13. It is clear that the NAS and the members of its committees have First Amendment associational rights. *See generally, Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984). One would expect that if Congress had meant to constrain those rights in FACA, it would have stated its intention explictly. Given the constitutional interests at stake, Congress' failure to provide a plain statement that this was its intended result lends further support to a narrow construction of "utilize."

arrangements.[5/] Instead, Congress accepted the approach of the House bill, which would have excluded groups organized by government contractors.[6/] *See* H.R. Conf. Rep. No. 92-1403, 9 (1972) ("Conference Report") ("The conference substitute . . . adopts the House definition of 'advisory committee' with modification"). The Conference Report went on to state:

> The Act does not apply to persons or organizations which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies.

Id. at 10. If this explanation of FACA were applied here, the court of appeals' decision should be reversed. The Guide

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[5/] The Senate Report explained that the terms "established" and "organized" in the Senate bill were meant to be interpreted

> in their most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, . . . such group is covered by the provisions of this bill. Examples of such groups are . . . committees of the national academies where they are utilized and officially recognized as advisory to the President, to an agency, or to a Government official.

S. Rep. No. 92-1098, 8 (1972).

[6/] Unlike the Senate bill, the House bill would have limited the statute's scope only to committees "established by one or more agencies." H.R. Rep. No. 92-1017, 3 (1972). The House Report made clear that the "[t]erm advisory committee [in the House bill] does not include any contractor or consultant hired by an officer or agency of the government." *Id.* at 4.

Committee (like other NAS committees) was established pursuant to a contractual relationship and was used "directly" by the NAS, not the government.

In presenting the final version of FACA as approved by the Conference, Representative Holifield, the head of the House delegation to the Conference, made clear that the legislation did not cover NAS committees:

> Mr. Horton: Am I correct in the understanding that this bill does not apply to such organizations as the National Academy of Sciences and its various committees which make studies and submit reports to Federal agencies on request?
>
> Mr. Holifield: The gentleman is quite correct.

118 Cong. Rec. 31,421 (1972). After Mr. Holifield quoted the above passage from the Conference Report regarding contractors, the following colloquy ensued:

> Mr. Horton: So, it [NAS] would be excluded?
>
> Mr. Holifield: That is correct.

Id.

The remarks of Representative Holifield, who was the principal sponsor of FACA, "are an authoritative guide to the statute's construction." *North Haven Board of Education v. Bell,* 456 U.S. 512, 527 (1982). Furthermore, the Conference's deletion of the language from the Senate bill that would have covered NAS committees in some circumstances "militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp*

Paving Co., 419 U.S. 186, 199-200 (1974), *quoted in North Haven*, 456 U.S. at 529.

The court of appeals brushed aside Representative Holifield's statement by means of a dubious rationale. The court first noted that the Holifield statement was quoted in a district court decision, *Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977). The court below then reasoned that it must be *presumed* that this Court found the statement to be unpersuasive *sub silentio*, because *Lombardo* had been cited in a footnote in an amicus brief filed in *Public Citizen*. App., *infra*, 9a-10a. But it was patently unfair for the court of appeals to decide the status of NAS committees under FACA by attempting to divine the hidden meaning of this Court's silence in a case that did not even involve the NAS. *Cf. Public Citizen*, 491 U.S. at 473 (Kennedy, J., concurring in the judgment) ("[t]he problem with spirits is that they tend to reflect less the views of the world whence they come than the view of those who seek their advice").

Moreover, the court of appeals erred in giving dispositive effect to this Court's comments about NAS in *Public Citizen*. This Court pointed to a 1970 House Report as support for its dictum that NAS was a "quasi-public" organization whose committees should be covered by FACA. *See* 491 U.S. at 460 n.11, *citing* H.R. Rep. No. 91-1731, 15 (1970). But that report states merely that "*[a] great number* of the approximately 500 advisory committees of the National Academy of Sciences (NAS) and its affiliates *possibly should be* added" to the list of advisory committees under Executive Order 11007. *Id.* at 15 (emphasis added). On its face, this tentative and qualified language plainly is not a sweeping finding that *all* NAS committees should be covered by FACA. In any event, the report was written in a separate session of

Congress two years before enactment of FACA and, because it was not accompanied by any legislation, it cannot and does not illuminate Congressional intent. *See Pierce v. Underwood*, 487 U.S. 552, 566 (1988).[7/]

The court below also erred in asserting that this Court in *Public Citizen* established alternative "prongs" for the interpretation of the word "utilized," one of which applies solely to "quasi-public" entities. App., *infra,* 12a, 13a. Read in context, the point of this Court's discussion was merely to establish that FACA's coverage was to be congruent with that of Executive Order 11007. 491 U.S. at 462-63, 465. That Executive Order established no special rule for "quasi-public" entities, but did cover committees "'utilized by a department or agency in the same manner as a Government-formed advisory committee.'" *Id.* at 462-63 (*quoting* the Executive Order) (emphasis added). That is, FACA covers only committees subject to "strict management by agency officials." 491 U.S. at 457-58.[8/] Under that test, NAS committees such

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[7/] In 1973, shortly after FACA's enactment, the Office of Legal Counsel of the Department of Justice concluded that "the legislative history . . . evidence[d] . . . a general intent on the part of Congress to exclude NAS committees from the coverage of the Act." C.A. App. 173. Similarly, in 1975 the district court in *Lombardo* concluded that Congress intended "to exclude from the coverage of [FACA] generally groups providing advice to federal agencies pursuant to a contractual relationship, and specifically the committees of the National Academy of Sciences when so doing." 397 F. Supp. at 800.

[8/] Indeed, the court of appeals followed exactly this rule in previous cases. *Washington Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994); *Food Chemical News v. Young*, 900 F.2d 328, 332-33 (D.C. Cir.) (Ginsburg, R.B., J.), *cert. denied*, 498 U.S. 846 (1990).

as the Guide Committee here concededly are not subject to FACA. App., *infra,* 5a.

The court of appeals' "quasi-public" test introduces a bewildering new element to the application of FACA. The "management and control" test that flows from the ordinary meaning of the term "utilize" is a relatively straightforward standard to apply in determining whether a committee must comply with FACA. By contrast, requiring a determination as to whether a private organization "can be thought to have a quasi-public status," App., *infra,* 8a, will lead to extensive and burdensome litigation on the status of many different organizations and their relationship to the government. No private organization that has extensive contacts with the government is provided any guidance as to whether its committees are subject to FACA. Certiorari is thus justified to avoid the confusion that will flow from the court of appeals' construction of FACA.

II. The Court of Appeals Felt Bound By This Court's Dicta In *Public Citizen* And Thus Review By This Court Is Essential To Ensure That NAS Has A Fair Opportunity To Litigate Its Status Under FACA.

The court of appeals' sole basis for asserting that NAS is a "quasi-public" entity is this Court's "perception of the NAS' characteristics," as articulated in *Public Citizen*. App., *infra,* 11a. But the status of NAS was not at issue in *Public Citizen*, and the Court's references to NAS are classic examples of dicta: NAS did not participate in the case in any way; the application of FACA to NAS and its committees was not before the Court; no record was developed to provide a factual basis for a decision on the point; and the parties did not brief the issue, nor did they have reason to discuss NAS, because its status was irrelevant to the case.

Under these circumstances, no one would contend that *Public Citizen* is binding on NAS, and indeed the court below was careful to state that the analysis in *Public Citizen* "is not, strictly speaking, a holding that NAS committees are FACA advisory committees." App., *infra*, 10a. Nonetheless, the court read *Public Citizen* to hold that FACA applies to "offspring of 'quasi-public' organizations," *id.*, and it felt constrained by this Court's dicta characterizing NAS as a quasi-public entity.

As noted, the term "quasi-public" appears nowhere in FACA or its legislative history. In fact, the court of appeals acknowledged that "quasi-public does not have an independent meaning divorced from the Court's reference in *Public Citizen*." App., *infra*, 10a. The court of appeals observed that the term quasi-public "merely stood for a set of qualities that the Court thought critical," *id.*, and it concluded, based on this Court's "perception" in *Public Citizen*, *id.* at 11a, that "NAS is imbued with those very characteristics." *Id.* at 10a. Accordingly, in holding that NAS is a "quasi-public" entity whose committees are subject to FACA, the court of appeals disregarded, as "irrelevant," *id.*, the facts in the record demonstrating that this characterization is misplaced:

- NAS is purely private for all of the reasons given by the district court, App., *infra,* 33a, including Congress' designation of NAS as a "private corporation[] established under Federal law," 36 U.S.C. § 1101 (32).[9/]

[9/] The district court correctly concluded that, under *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 392 (1995), "this Congressional designation is 'dispositive' of the [NAS'] status under FACA, namely, . . . it is 'private' rather than 'public' or 'quasi-public.'" App., *infra*, 32a. The court of appeals brushed

- NAS was not "formed" by the federal government, App., *infra,* 7a, 10a, 11a. Instead, as the district court pointed out, App., *infra*, 32a, NAS, like numerous other private corporations established in the District of Columbia during the 1860s, received its charter from Congress.

- NAS is "in receipt of public funds," App., *infra*, 7a; *see id.* at 10a, only pursuant to contracts, grants, or cooperative agreements with federal agencies. It also is in receipt of private funds. In any event, the Conference Report makes crystal clear that FACA does not apply to committees formed by organizations such as NAS that "have contractual relationships with Federal agencies." Conference Report at 10. As the district court concluded, NAS' receipt of federal funds pursuant to contract does not convert NAS into a "quasi-public" entity any more than it would convert General Electric or Lockheed Martin into "quasi-public" corporations. App., *infra*, 32a-33a.

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aside *Lebron*, stating that "[w]hether an organization has sufficient governmental characteristics to implicate the First Amendment is hardly the same question . . . as whether an organization is quasi-public." App., *infra*, 11a. But this misses the point of *Lebron's* relevance to this case. As the district court noted, this Court in *Lebron* stated that "Amtrak's authorizing statute was 'assuredly dispositive of Amtrak's status . . . for purposes of matters that are within Congress' control — for example . . . the Federal Advisory Committee Act.'" App., *infra*, 31a-32a, *quoting Lebron*, 513 U.S. at 392 (emphasis added by district court). The court of appeals' dismissal (as beside the point) of the statute designating NAS as a private corporation is thus at odds with *Lebron*.

> • NAS' charter provides, among other things, that NAS is to furnish scientific "advice to the Government," App., *infra,* 10a, but this corporate obligation does not alter NAS' status as a private organization. Like any other private entity that provides goods or services to the government, the mechanism through which NAS provides requested advice to federal agencies *in every instance* is a contract, grant, or other agreement. C.A. App. 181

This Court's references to NAS in *Public Citizen* seem to have arisen from a mistaken assumption that NAS committees are utilized by government agencies in the same manner as government-formed advisory committees. *See* 491 U.S. at 460. As the district court found and the record amply demonstrates, however, the government utilizes *NAS*, not its committees, and NAS committees clearly do *not* operate in the same manner as government-formed advisory committees. To the contrary, the real value of NAS studies and reports to both the government and the public is the complete independence of NAS and its committees from government control. Yet, the effect of the court of appeals' decision is to convert this Court's assumptions about NAS committees and how they operate into a conclusion — not based on fact and certainly not based on any record — that is binding on NAS. This result is grossly unfair to NAS.

Last Term, in *Richards v. Jefferson County, Alabama*, ___ U.S. ___, 116 S.Ct. 1761, 1765-66 (1996), this Court took note of

> the general consensus "'in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' *Hansberry v. Lee*, 311 U.S. 32,

> 40 (1940). This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 4449, p. 417 (1981)." *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989). As a consequence, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Id.*, at 762. *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971).

As *Richards* makes clear, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 n. 7 (1979). The court of appeals' holding that NAS is effectively bound by this Court's *dicta* in *Public Citizen* cannot be squared with these fundamental principles of fair adjudication.

Because NAS was not a party to *Public Citizen*, it could not establish the facts about NAS' operations and private status or even explain why the statute plainly does not apply to it. NAS is entitled to its day in court. The court of appeals' decision effectively deprives NAS of its basic right to be heard, and only review by this Court can protect this basic right.

III. The Importance Of The Issue Presented Warrants Certiorari.

The issue of FACA's application to NAS committees is of exceptional importance not only to NAS, but also to the government and the general public. If NAS committees are subject to FACA, they will be transformed from internal

committees of NAS, an entity independent of the federal government, to federally controlled committees open to a range of obligations, including management by federal officials. As noted above, FACA requires that a federal official, among other obligations, must approve each meeting and its agenda, FACA § 10(f), and must "chair or attend each meeting," *id.* § 10(e). Thus, application of FACA to NAS committees necessarily will undermine both the confidentiality of the NAS' deliberations and NAS' independence.

The decision below could affect as many as 450 current committees that were formed by NAS to assist it in providing services to the government pursuant to federal contracts or grants. Indeed, the decision already has had an adverse impact on a different NAS project involving another NAS committee. In *Natural Resources Defense Council v. Curtis*, Civ. No. 97-0308 (PLF) (D.D.C. Mar. 5, 1997), the district court, following the court of appeals' decision in this case, issued a preliminary injunction barring the Department of Energy ("DOE") from providing any further funding to NAS for the purpose of supporting the work of the Committee for the Review of the Inertial Confinement Fusion Program at the DOE, and barring DOE from relying on the resulting NAS report. Thus, as a direct consequence of the holding in this case, DOE is precluded from considering a report by the country's preeminent scientific institution on a multi-billion dollar project that is central to this country's efforts to avoid the need for nuclear weapons testing.

The court of appeals' decision will compel similar results in other cases where NAS uses committees to assist it in preparing expert reports pursuant to contracts with federal agencies and where government officials rely on NAS' work product. As a result, the decision will have a severe impact on the government's ability to obtain valuable, independent advice from NAS. And, given the range of government

decisions that implicate science and technology (see the examples of recent NAS studies described at p. 8, *supra*), federal agencies will have a continuing need for the foreseeable future to turn to NAS for expert advice — a need that cannot adequately be filled by any other identifiable sources.

The value of NAS studies depends, in large measure, on NAS' credibility with the government and the general public. That credibility, in turn, derives from the NAS' status as a private entity, wholly independent of the government. If NAS were forced to relinquish control of its own committees to government officials, NAS' independence would be compromised and the value of NAS studies for the government and the public would decrease substantially. Moreover, if NAS were forced to open its deliberations, it would be subject to intense public and private efforts to alter its work product. The adverse impact of the decision below on NAS' current projects and, most importantly, on the ability of the government and the public to continue to obtain independent studies and analyses from NAS justifies certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 4, 1997

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 2, 1996 Decided January 10, 1997

No. 96-5011

ANIMAL LEGAL DEFENSE FUND, INC. ET AL.
APPELLANTS

v.

DONNA E. SHALALA, ET AL.
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(94cv01003)

Before: SILBERMAN, GINSBURG, AND SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: Appellants challenge the district court's determination that a National Academy of Sciences committee, which promulgates and revises a guide on the care and use of laboratory animals for government agencies, is not subject to the Federal Advisory Committee Act because it is not "utilized" within the meaning of the statute. We reverse.

I.

The National Academy of Sciencies (NAS), Appellee-Intervenor, was chartered by Congress in 1863 and has a duty to, "whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art." 36 U.S.C. § 253 (1994). The Academy's principal operating arm is the National Research Council, which includes as one of its subcomponents the Institute for Laboratory Animal Resources. For over four decades, the Research Council and the Institute have produced for the federal government the *Guide for the Care and Use of Laboratory Animals*, a scientific manual which includes guidelines for handling and monitoring the treatment of laboratory animals.

Although the *Guide* is distributed and referenced throughout the world, some of its primary users are federal agencies that have statutory duties to ensure that research laboratory animals are treated properly. Health and Human Services regulations, for instance, actually require that institutions funded by the National Institute of Health follow the most recent version of the *Guide* in adopting programs involving laboratory animals. *See* 48 C.F.R. § 380.205(a)(1) (1995). The United States Department of Agriculture has also incorporated the *Guide*'s recommendations into regulations. *See* 56 Fed. Reg. 6,428 (Feb. 15, 1991). The Interagency Research Animal Committee, which consists of representatives from each federal agency that uses animals in research, refers readers of its government-wide *Principles for the Utilization and Care of Vertebrate Animals Used in Testing, Research and Training* to the *Guide* as an aid to the interpretation and execution of the *Principles*.

The most recent revision of the *Guide*—the 7th edition —is again being produced by a committee of the Research

Council and the Institute (the "Guide Committee"). The Institute selected 16 individuals to serve on the Committee based on the recommendations of academics, industry scientists, toxicologists, veterinarians, members of the Academy, and others. A majority of the members are scientists of national stature who use animals in research and possess expertise in various areas of science, ethics, veterinary medicine, and animal welfare. The Institute had decided to revise the *Guide* at a workshop it convened in 1991, so it submitted a grant proposal to the NIH, which approved the grant in 1993. Representatives of the NIH and other federal agencies attended the Committee's first meeting and recommended new issues to be addressed by the updated *Guide*, but no federal agency further involved itself in the Committee's deliberative process. The Academy's rules on confidentiality prevented Committee members from discussing the substance of the Guide with representatives of the sponsoring agencies. The NAS informed the public of the Guide Committee's appointment and held public forums, but the Committee denied public access to its deliberative meetings.

Appellants, the Animal Legal Defense Fund, Psychologists for the Ethical Treatment of Animals, and the Association of Veterinarians for Animal Rights, sought access to those meetings and to any minutes, transcripts, or records of the Committee under the Federal Advisory Committee Act, 5 U.S.C. App. § 1-15 (1994) (FACA). Appellants named as defendants, individually and collectively, HHS, the Public Health Service, and NIH (collectively, "the government"). The NAS subsequently intervened as a co-defendant. The district court denied appellants' motion for a preliminary injunction to attend the meetings, and their appeal from that order was dismissed as moot when four days before oral argument the Committee conducted its final meeting, leaving nothing to enjoin. *Animal Legal Defense Fund v. Shalala*, 53

F.3d 363 (D.C. Cir. 1995). On remand, the district court granted the defendants' motion for summary judgment, concluding that the Guide Committee was not an "advisory committee" subject to FACA because it was not "established or utilized by one or more agencies." 5 U.S.C. App. § 3(2)(C).

II.

Congress enacted FACA in 1972 to control the establishment of advisory committees to the federal government and to allow the public to monitor their existence, activities, and cost. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989). The statute states:

> For the purpose of this Act—
>
> * * *
>
> (2) The term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as 'committee'), which is—
>
> (A) established by statute or reorganization plan, or
>
> (B) established or utilized by the President, or
>
> (C) established or *utilized* by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and

(iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

5 U.S.C. App. § 3 (emphasis added). It is quite obvious that the Committee was and is *used* by HHS, but the term "utilized" was given a very narrow interpretation by the Supreme Court in *Public Citizen*. In so doing, however, the Court indicated quite explicitly in an extensive discussion, which appellants emphasize, that advisory committees formed by the NAS were precisely the sort of advisory committees that would be covered by the Act. *See Public Citizen*, 491 U.S. at 462-63. The government and the NAS respond that the Supreme Court's discussion regarding the NAS in that opinion was only dictum; the status of the NAS committee was not really in issue in that case, and therefore this case is governed by subsequent opinions of our court, particularly *Washington Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994), and *Food Chem. News v. Young*, 900 F.2d 328 (D.C. Cir.), *cert. denied*, 498 U.S. 846 (1990), both of which applied *Public Citizen* and adopted a "management and control" test to determine whether a committee not established by a government agency is nevertheless "utilized." It is indisputable that no government agency could be thought to exercise that degree of influence over the Guide Committee.

The case before us, then, turns on a careful reading of these three previous cases. We start naturally with *Public Citizen*. The issue before the Supreme Court was whether FACA covered the ABA's Standing Committee, which although not "established" by the government, had been for many years formally consulted by the Justice Department, on behalf of the President, as to the relative qualifications of individuals whom the Administration intended to nominate for federal judgeships. Since the Standing Committee solicited views of lawyers, judges, and others on a confidential basis,

and its deliberations were also supposed to be confidential, it was argued that the application of FACA to it would be its death knell. FACA requires that committees file charters, notify the public in advance of meetings, open the doors to those meetings to all comers, keep detailed minutes, and perhaps most onerous, make documents available for public inspection subject to Freedom of Information Act limitations. 5 U.S.C. App. §§ 9(c), 10(a)-(c). An application of those requirements allegedly would have made it impossible for the Standing Committee to continue to operate.

Justice Brennan, writing for the majority, observed that the statute "[r]ead unqualifiedly ... would extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an executive agency seeks advice." 491 U.S. at 452. It should be noted that the "definition" in the statute never fully explains what *is* an advisory committee; this is why the majority (and the dissenters) in *Public Citizen* thought that determining whether a private group consulted by the executive branch was a FACA advisory committee—thus triggering all the requirements of the statute—depended entirely on the meaning of one word: utilize.

The Court reasoned, drawing upon legislative history, that Congress did not intend that every time the President consulted the NAACP on an appointment to the EEOC, or the leaders of an American Legion Post for their opinion of military policy, or the presidential party's National Committee on Cabinet appointments, that an advisory committee charter be prepared and minutes kept of the meeting. The Court therefore further canvassed the legislative history to find the limiting principle to determine what sort of private group could be thought "utilized" as an "advisory committee." (The work "utilized" had to be given some meaning.) That "legislative history" included a previous executive order and

the proceedings of the Congress prior to the one which passed the Act. The Court concluded that Congress intended to extend the requirements of the Act beyond those committees *established* by the government only to private groups that were used by the President or an executive branch agency *in the same manner* as advisory groups established by the government.

At that point, there is a gap in the Court's stated reasoning; it was not explained why the ABA Standing Committee was *not* employed in the same way as a government-established advisory committee.[1/] The Court simply asserted that "[t]here is no indication in the [House] Report that a purely private group like the ABA Committee that was not formed by the Executive, *accepted no public funds*, and assisted the Executive in performing a constitutionally specified task ... was the type of advisory *entity* that legislation was urgently needed to address." 491 U.S. at 460 (emphasis added).

Instead, according to the Court, the House Report and Congress intended to cover, by use of the word "utilized," committees like those established by the National Academy of Sciences. NAS Committees were the "paradigmatic example" because the NAS is a "quasi-public organization in receipt of public funds." *Id.* at 460. The Court thereafter repeatedly referred to the NAS—and its committees—as the example of the organization Congress had in mind as "off-spring of [an] organization created *or permeated* by the Federal Government." *Id.* at 463. In other words, the definition

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[1/] The Standing Committee purported to be nonpartisan, although in recent times that proposition had been in dispute. *See Association of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 906 n.4 (D.C. Cir. 1993).

given by the Court to an advisory committee utilized by the federal government focuses not so much on *how* it is used but whether or not the character of its creating institution can be thought to have a quasi-public status.[2/]

Still, both the government and the NAS argue that we are not bound by the Court's conclusion that NAS committees are the paradigm encompassed by the term utilized—and thus covered by the Act. The NAS points out that the Supreme Court did not consider the deleterious effects of FACA's requirements on its deliberative processes: As the NAS sees it, open meetings and records would compromise its internal review procedures and inhibit candid exchange among its members. And the NAS contends that the Supreme Court's analysis of the legislative history is flawed because it relied on the deliberation of a prior Congress (and a preexisting executive order addressing advisory committees), which should not be thought probative of the views of the enacting Congress. We admit that we are not admirers of the Court's techniques in exploring the legislative history (or indeed on its extensive reliance on legislative history itself), but we are in no position, hierarchically, to reject the Court's approach.

The NAS calls to our attention a piece of legislative history favorable to it—but not mentioned by the Supreme Court: Just before the House voted to enact the bill, the Chairman of the Committee that developed the legislation, Mr. Holifield, seemed to indicate that the NAS was not to be included within the coverage of the Act.

[2/] The Court went on to reason that its restricted definition of utilize is necessary to avoid the constitutional question—interference with the President's appointment power—that the dissent would have decided. *Id.* at 465-67.

Mr. Horton: Am I correct in the understanding that this bill does not apply to such organizations as the National Academy of Sciences and its various committees which make studies and submit reports to Federal agencies on request?

Mr. Holifield: The gentleman is quite correct. If he will refer to the joint explanatory statement of the committee of conference [the Conference Report on FACA] at page 10, the first full paragraph, it states as follows:

> The Act does not apply to persons or organizations which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies.

As the gentleman knows, the National Academy of Sciences was founded by Congress and, therefore, it comes under that category.

Mr. Horton: So, it would be excluded?

Mr. Holifield: That is correct.

118 CONG. REC. 31,421 (1972). Chairman Holifield's answer appears to be something of a non sequitur and this sort of parliamentary dialogue is not the most reliable form of legislative history. Moreover, the dialogue appeared in a district court opinion, *Lombardo v. Handler*, 397 F. Supp. 792, 799 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977), squarely holding that a NAS committee was *not* subject to FACA, of which the Supreme Court was surely aware. Indeed, it was cited, albeit in a footnote, in the *amicus* brief filed by the People for American Way upon which the Supreme Court heavily relied. That it was not mentioned in the opinion, we

must *presume*, indicates that the Supreme Court did not think it significant.

We agree with appellees nevertheless that the Supreme Court's analysis is not, strictly speaking, a holding that NAS committees are FACA advisory committees. What *is* part of the holding however, is its conclusion that by employing the term "utilized," in addition to "established," Congress had in mind an extension of the Act's coverage to include the offspring of "quasi-public" organizations "permeated by the Federal government." *Id.* at 460, 463. After all, that is the only sort of advisory committee the Court recognized as reached by the term "utilized." Unfortunately for appellees, they are not able to point to any other organization that fits this category more readily.

In that regard, we think appellees' argument and the district court's conclusion that the NAS is not really a "public" corporation is quite beside the point. It is irrelevant that, as the district court pointed out, the NAS charter specifically provides that it is "a private corporation," or that it lacks regulatory authority, or that its employees are not employed by the United States Government, or that the United States Government has no seats on the Academy's Board nor power to choose its officers nor appoint members of its committees. This argument assumes that there is some sort of preexisting definition of "quasi-public" to which the *Public Citizen* Court referred when it discussed quasi-public organizations. But quasi-public does not have an independent meaning divorced from the Court's reference in *Public Citizen*. The term merely stood for a set of qualities that the Court thought critical. And the NAS is imbued with those very characteristics: [W]hat mattered to the Court was whether the organization was "purely private," who formed and funded it, and whether it was formed "for the explicit purpose of furnishing advice to the Government." 491 U.S.

at 460 n.11. The NAS was created by Congress to answer the government's requests for investigations, examinations, experiments, and reports, 36 U.S.C. § 253, and the government takes care of the expenses associated with performing these tasks.

It follows that the district court's reliance on *Lebron v. National RR Passenger Corp.*, 115 S. Ct. 961 (1995), holding that Amtrak is a government entity for purposes of the First Amendment, is wholly misplaced. Whether an organization has sufficient governmental characteristics to implicate the First Amendment is hardly the same question (nor does it even bear on the issue) as whether an organization is quasi-public for purposes of the Supreme Court's analysis in *Public Citizen*. In *Public Citizen*, the Court asked only whether particular committees asserted to be "utilized" by the government as FACA advisory committees were formed (established) by a non-governmental organization that was "created or permeated by the Federal Government." 491 U.S. at 463. It is almost redundant—in light of the Court's reasoning from its perception of the NAS' characteristics—for us to conclude that NAS committees pass that test.

We see no real tension between appellants' reading of *Public Citizen*, with which we agree, and our two cases on which appellees rely. In *Food Chemical News v. Young*, we encountered a committee of a wholly *private* organization, the Federation of America Societies for Experimental Biology (a major biomedical research organization), 900 F.2d at 329. We held that its committee, which advised the FDA, was not an advisory committee *utilized* by the federal government because it "was not amenable to [any] management by [FDA] officials," or "by [any] semiprivate entity the Federal Government helped bring into being." 900 F.2d at 333 (quoting *Public Citizen*, 491 U.S. at 457-58, 463). By so doing, we actually extended slightly, rather than, as the

government contends, restricted, the meaning of a "utilized advisory committee" that the Supreme Court gave in *Public Citizen*. The Court's opinion could have been read to imply that no purely private committees could be FACA advisory committees. We recognized, however, that if a government agency actually took over the management of such a committee, it would be brought under FACA. But we also recognized, as indeed we were compelled to do by the Supreme Court's *Public Citizen* opinion, that if a committee advising the government were established by a "semiprivate" (read: quasi-public) agency instead of a government agency, it would meet the alternative test set forth by the Supreme Court.

In *Washington Legal Found. v. United States Sentencing Comm'n*, it was claimed that an "Advisory *Working Group* on Environmental Sanctions," 17 F.3d at 1447 (emphasis added) (a committee by any other name is still a committee), established by the U.S. Sentencing Commission was covered by FACA. The primary issue in the case was whether the Sentencing Commission was an "agency" within the meaning of FACA. We held that it was not because FACA exempted the courts of the United States; the Sentencing Commission is part of the judicial branch and, in any event, Congress meant the Sentencing Commission to be excluded from the Administrative Procedure Act, which determines FACA coverage. *Id.* at 1447-48.

The alternative argument presented in *Washington Legal Foundation* was that the Department of Justice had two members on the "working group" (presumably the product of their deliberations was shared by the Department) and therefore the committee was utilized within the meaning of FACA. We dismissed this argument, stating that the utilized test is a stringent standard, denoting "something along the lines of actual management or control of the advisory

committee." *Id.* at 1450 (emphasis added). Appellees, and the district court, believe that by so stating we narrowed the *Public Citizen* test so that no advisory committee, including one established by a quasi-public organization, could be deemed utilized unless the circumstances met the management and control by the government test.

We think appellees and the district court badly overread our opinion. We did not even refer to the alternative prong of the utilize test that comes from *Public Citizen*, *i.e.*, whether an organization that establishes an advisory committee can be described as quasi-public. We quoted only the first prong drawn from *Food Chemical News v. Young*, "so closely tied to an agency as to be amenable to strict management by agency officials," *id.* at 1451 (internal quotation omitted), ignoring the second part of the full *Young* sentence: or "by [any] semiprivate entity the Federal Government helped bring into being." 900 F.2d at 333. We obviously thought the case did not raise an issue similar to the instant case. Certainly, the Sentencing Commission, which established the working group, is more than a *quasi*-public organization; it is itself a governmental entity. But it would have been anomalous, once having concluded that advisory committees directly established by the Sentencing Commission were exempt from FACA, to decide that they could nevertheless lose their exemption if their deliberations were passed on to the Department of Justice *because* of the Sentencing Commission's public status. That result would surely pervert congressional intent. In short, the quasi-public prong simply did not have any relevance to the Sentencing Commission case. That is why we focused *only* on the question whether the Justice Department itself could be said to manage and control the working group. In that event, the *Young* standard would be met and, as a corollary, the exemption for Sentencing Commission advisory committees would not properly apply.

* * * *

To sum up, under *Public Citizen*, the Guide Committee must be regarded as utilized by HHS because it relies on the Committee's work product and because it was formed by the NAS, a quasi-public entity. Nothing in our two cases undermines that conclusion. Accordingly, we reverse the district court's grant of summary judgment for the government and remand so that the district court may determine whether there are documents to which the appellants may obtain access under FACA and whether other injunctive relief should issue.

So ordered,

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND et al.,	:	
Plaintiff,	:	
v.	:	
DONNA SHALALA, et al.,	:	Civil Action No. 94-1003 (GK)
Defendants,	:	
and	:	[Filed Dec. 20, 1995 Clerk, U.S. District Court District of Columbia]
NATIONAL ACADEMY OF SCIENCES,	:	
Defendant-Intervenor.	:	

MEMORANDUM OPINION

This action is brought under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. II §§ 1-15 (1988). Plaintiffs are the Animal Legal Defense Fund, Psychologists for the Ethical Treatment of Animals, and the Association of Veterinarians for Animal Rights, a group of organizations dedicated, among other things, to promoting animal welfare within the animal research community. They seek a declaration that a committee of the National Academy of

Sciences ("Academy"), which revised the *Guide for the Care and Use of Laboratory Animals* ("*Guide*"), is subject to the procedural requirements of FACA. Plaintiffs also seek to enjoin the Academy from releasing the revised *Guide* until there is full compliance with FACA.

I. Statement of Facts

The *Guide for the Care and Use of Laboratory Animals* ("*Guide*") is a product of the national Academy of Science, its component the National Research Council ("NCR"), and its subcomponent the Institute of Laboratory Animal Resources ("ILAR"). The *Guide* is one of the Academy's most widely distributed publications. First published in 1963, and subsequently revised in 1968, 1972, 1978 and 1985, the *Guide* contains general guidelines for monitoring the care of laboratory animals and providing appropriate veterinary care and physical accommodation for those animals. *See Guide* at preface. The Department of Health and Human Services ("HHS"), through the National Institute of Health ("NIH"), requires institutions who receive funding from NIH to use the *Guide* to develop and implement programs for activities involving animals. *See* Public Health Service Policy on Humane Care and Use of Laboratory Animals. 48 C.F.R. PHS § 380.205.[1/]

In September 1991, ILAR proposed convening a group of Academy members, scientists, and government officials to determine whether there was a need to revise the *Guide* and the potential for receiving financial support for the effort.

[1/] The United States Department of Agriculture ("USDA") is also under a statutory duty to develop standards for the care and treatment of animals used in research. *See* 7 U.S.C. § 2143(a). In issuing standards, USDA, through its Animal and Plant Health Inspection Service ("APHIS"), consults with HHS and also references the *Guide*.

Two months later, on November 13, 1991, that group convened in Washington D.C. and unanimously agreed that the *Guide* should be revised. Six federal agency officials were present at that meeting. *See* Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' and Defendant-Intervenor's Motions for Summary Judgment ("Pl. Motion") at 12.

Almost one year later, on October 6, 1992, the Academy submitted a grant proposed to the National Institutes of Health ("NIH") proposing that HHS fund the revision of the *Guide*. On August 12, 1993 HHS approved the grant, and, one month later, NAS assembled a team of fifteen people to serve on the Revision Committee ("Committee"), none of whom were government officials.[2/] The Committee met a number of times: November 30, 1993; December 1, 1993; February 2, 1994; February 4, 1994; November 2-4, 1994; and February 22-24, 1995. The revised *Guide* is scheduled for distribution in January, 1996.

II. Procedural History

On May 9, 1994, Plaintiffs filed a complaint alleging that the Revision Committee was an "advisory committee" subject

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[2/] The Revision Committee was composed of the following individuals: J. Derrell Clark, University of Georgia (Chairman); Ransom L. Baldwin, University of California; Kathryn Bayne, American Association for Accreditation of Laboratory Animal Care; Marilyn Brown, Dartmouth College; Gerald Gebhart, University of Iowa; Janet Gwathmey, Harvard Medical School; Michale Keeling, University of Texas; Dennis Kohn, Columbia University; J. Wesley Robb, University of Southern California; Orville Smith, University of Washington; Jo Ann D. Steggerda, Champaign, IL; John Vandenbergh, North Carolina State University; William White, Charles River Laboratories; Sarah Williams-Blangero, Southwest Foundation for Biomedical Research; and John VandeBerg, Southwest Foundation for Biomedical Research (ex officio member).

to FACA and that it was operating in violation of FACA's requirements. Plaintiffs sought to enjoin Defendants from using the Committee unless and until they complied with FACA. On July 7, 1994, the Academy moved to intervene as a co-defendant. That Motion was granted on September 14, 1994. One month later, on October 14, 1994, Plaintiffs moved for a preliminary injunction to bar Defendants from utilizing the Revision Committee until they had complied with FACA. Applying the test articulated by this circuit in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), the Court denied the request for a preliminary injunction because Plaintiffs failed to demonstrate a reasonable likelihood of success on the merits of their claim. Tr. of Hearing (Oct. 25, 1994) at 57.

Plaintiffs appealed the denial of the preliminary injunction and moved this Court for an injunction pending appeal. On October 31, 1995, this Court partially denied the Motion, but did enjoin Defendants from "destroying any documents which pertain to the work of the committee," *ALDF v. Shalala*, No. 94cv1003, slip. op. at 2 (D.D.C. Oct. 31, 1994), until completion of the appeal.

On May 9, 1995, the Court of Appeals dismissed the appeal as moot. The court noted that the injunctive relief sought by Plaintiffs was "an order that would simply afford them access to the meetings." *Animal Legal Defense Fund et al., v. Donna Shalala,* 94cv1003 Slip. Op. May 9, 1995 (D.C. Cir. 1995) at 4. By the time of the oral argument, however, the Revision Committee had held its last meeting. Thus, the court concluded that the appeal was moot, because there were no more meetings for the Plaintiffs to attend. In light of the parties' cross motions for summary judgment, the court remanded the case for consideration of the merits. *Id.* at 2. Accordingly, this case is before the court on Plaintiffs',

Defendants' and Defendant-Intervenor's cross-motions for summary judgment.[3/]

III. The Federal Advisory Committee Act

FACA was enacted in 1972 in response to the "numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government." 5 U.S.C.App. II. § 2(a). In *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989), the Supreme Court noted that through FACA, Congress sought

> to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature.

Id. at 446, citing 5 U.S.C.App. II § 2(b).

The statute subjects "advisory committees" to substantial procedural requirements. Each "advisory committee" must file a charter, § 9(c), and keep detailed minutes of its meetings. § 10(c). Furthermore, a representative of the Federal Government, with authority to order adjournment, must attend every advisory committee meeting. § 10(e).

[3/] On June 9, 1995, Plaintiffs moved for a permanent injunction, which is also pending before this Court. The Court's ruling today on cross-motions for summary judgment will also dispose of the motion for permanent injunction.

FACA also requires advisory committees to provide advance notice of their meetings and to open them to the public. § 10(a). Subject to Freedom of Information Act limitations, advisory committee documents must be made available for public inspection. § 10(b); 5 U.S.C. § 552. Advisory committee membership must be balanced in terms of points of view represented. 5(b)(2), (c).

Under FACA, an "advisory committee" is defined as:

> any committee, board, commission, council, conference, panel task force, or other similar group, or any subcommittee or other subgroup thereof, which is—
>
> (A) established by statute or reorganization plan
> (B) established or utilized by the President, or
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, [with exceptions not relevant here]. 5 U.S.C.App. II, § 3(2).

All parties agree that the question in this case is whether the Revision Committee falls under subsection (C), namely, whether the Committee was "established or utilized" by the Defendant agencies. If the Defendants either "established" or "utilized" the Revision Committee, it is virtually conceded that the *Guide* has been developed in violation of FACA's procedural requirements.

IV. The "Established" Prong of FACA

Defendants, Department of Health and Human Services, Public Health Service, National Institutes of Health, and Department of Agriculture ("Defendants" or "Defendant

agencies"), contend that they did not "establish" the Revision Committee because the proposal to create the Committee originated with the Defendant-Intervenor *Academy*, not the Defendant agencies. Defendants further note that the Academy selected the Committee's members and controlled the scheduling of Committee meetings and meeting agendas.

Moreover, Defendants note that the Academy will not release the updated *Guide* until the report has passed through the Academy's — not the Defendants' — internal review process. Once the Committee has prepared a draft, the Academy provides a detailed review of that draft report by independent experts, and, guided by that review, determines when and if the report is ready for release to the sponsoring agency. Declaration of National Academy of Sciences Executive Officer E. William Colglazier ¶ 13. The report is released to the sponsoring agency only when the Chairman of the Academy's Report Review Committee determines that its own institutional review has been satisfactorily completed and the manuscript has been approved by the executive director of the committee's parent unit within the Academy. *Id.* ¶ 10.

In response, Plaintiffs contend that because "federal agencies were extensively involved in the formation of the Guide Revision Committee, there is ample evidence to support a finding that they 'established' this committee within the meaning of FACA." Pl. Motion. at 45.

In *Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975) *aff'd mem.*, 546 F.2d 1042 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977),[4/] the Administrator of the

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[4/] The court is aware that under Circuit Rule 28(c), the Court of Appeals decision in *Lombardo*, as an unpublished decision, is not binding

(continued...)

Environmental Protection Agency ("EPA") was ordered by statute to "undertake to enter into appropriate arrangements with the [National Academy of Sciences] to conduct a comprehensive study" on vehicle emission standards. 397 F. Supp. at 796. The EPA thereafter entered into a contract with the Academy to perform such a study. *Id.* at 797. The Academy, in turn, created the Committee on Motor Vehicle Emissions ("CMVE"), to conduct the study and then advise the Academy. Plaintiffs argued that CMVE was an "advisory committee" under FACA.

In *Lombardo*, the district court held that CMVE was not "established" by the EPA. The court noted that the "proposal to create a committee within the Academy to conduct the study *originated within the Academy, not the E.P.A." Id.* at 797 (emphasis added). The court also said that EPA was "primarily concerned about the substance, scope and focus of the scientific study *rather than with the internal organizational arrangements"* of the Academy or Committee. *Id.* (emphasis added). Consequently, the court concluded that CMVE was "directly established" by the Academy, not EPA. *Id.*

Our circuit has also spoken on the "established" prong of FACA. In *Food Chemical News v. Young*, 900 F.2d 328, 332 (D.C. Cir. 1990), the Food and Drug Administration ("FDA") contracted with a private scientific organization, the Federation of American Societies for Experimental Biology ("FASEB"), to provide counsel on food and cosmetic safety

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[4/](...continued)
precedent in this Circuit. *See National Classification Committee v. United States*, 765 F.2d 164, 170 (D.C. Cir. 1985) (an unpublished decision is binding upon the parties if relitigated, but "has no precedential effect with respect to other parties"). Of course, the court may consider *Lombardo* as persuasive authority, and in this instances does find it do be so.

issues. The FASEB, in turn, assembled a group of seven experts to produce a report.

The court held that the expert committee was not "established" by the FDA because the FASEB—not the agency—had "proposed the panel, and alone selected its members." *Id.* at 333. The court interpreted the Supreme Court's decision in *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989), to mean that 'established' indicates a *Government*-formed advisory committee.'" *Id.* at 332 (quoting *Public Citizen*, 491 U.S. at 461) (emphasis added).

Applying the reasoning of *Food Chemical News* and *Lombardo*, it is clear that the Defendant agencies did not "establish" the Revision Committee. Federal officials may have been present to decide whether to set up such a committee, but ultimately it was the *Academy*, not the government, who proposed, chose and convened the Revision Committee. While it is true that the Defendant agencies were concerned with general subjects to be considered in the *Guide*, they were only minimally involved with the internal organization of the Revision Committee. The government agencies did not play any meaningful part in the selection of Revision Committee members, and did not play any other role in the Committee's formation.

Accordingly, the Court holds that the Revision Committee was not "established" by the Defendant agencies. The next issue, therefore, is whether the Defendants "utilized" the Revision Committee within the meaning of FACA.

V. The "Utilized" Prong of FACA

This circuit has spoken clearly on the test for "utilized" under FACA. "The word 'utilized' in FACA ... is a stringent standard, denoting something along the lines of

actual management and control of the advisory committee." *Washington Legal Foundation v. United States Sentencing Commission*, 17 F.3d 1446, 1450 (D.C. Cir. 1994) ("*WLF*") (emphasis added). This standard reflects the fact that "Congress did not intend for FACA to apply to 'every formal and informal consultation between the President or Executive Agency and a group rendering advice.'" *Sofamor Danek Group v. Gaus*, 61 F.3d 929, 933 (D.C. Cir. 1995) (quoting *Public Citizen*, 491 U.S. at 462).

In *WLF* the United States Sentencing Commission ("Sentencing Commission") established the "Advisory Working Group on Environmental Sanctions" to assess the sentencing guidelines for environmental crimes. *Id.* at 1447. Even though the Department of Justice was directly involved in the advisory group (two of the sixteen members of the advisory committee were DOJ employees), the court found that DOJ did not "manage or control" the group, and therefore rejected plaintiffs' contention that FACA applied to the advisory group because it was "utilized" by DOJ. *Id.* at 1452. Then-Chief Judge Mikva held that whether a committee is "utilized" under FACA, "centers around the quantum of control an agency has over an advisory committee." *Id.* at 1450. Despite the fact that DOJ had "significant influence on ... deliberations and on the ensuing recommendations," the court found that because "influence is not control," *id.* at 1451, FACA did not apply.

The court's holding in *WLF* followed its earlier decision in *Food Chemical News v. Young, supra*, where the court said that under FACA, "'utilized' encompasses a group organized by a nongovernmental entity ... so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" 900 F.2d at 332-333 (quoting *Public Citizen*, 491 U.S. at 457-58, 463). In *Food Chemical News*, the court noted that FASEB, not the FDA, directly "utilized" the panel

because the panel "'was not amenable to [any] management by [FDA] officials' or 'or by [any] semiprivate entity.'" *Id.* at 333 (quoting *Public Citizen*, 491 U.S. 457-58, 463). The court concluded that EPA did not "utilize" the committee because:

> FASEB proposed the panel, and alone selected the members. FASEB also set the panel's agenda, scheduled its meetings, and would have reviewed the panel's work.

Id. at 333.

In this case, Defendant agencies argue that, like DOJ in *WLF* and EPA in *Food Chemical News*, they neither manage nor control the Revision Committee. Defendants point out that (1) the Academy initiated the proposal for reviewing the *Guide*; (2) the Academy selected the members of the Committee; (3) neither the Academy nor the Revision Committee took substantive direction from federal officials; (4) the Committee's work in developing a draft report is strictly confidential and is not subject to any interference or involvement by the government; and (5) the Committee is subject to the day-to-day management by the Academy, not the government.

Plaintiffs, however, note a number of events that purportedly show Defendants' intricate involvement in the Revision Committee. For example, Plaintiffs point to the fact that Dr. Thomas Wolfle, Program Director of the Academy's ILAR, attended two meetings of the Interagency Research and Animal Committee (IRAC), which consists of federal agency representatives from all agencies that use animals or oversee the use of animals in research. Plaintiffs argue that Dr. Wolfle's presence at the IRAC meetings shows that the federal

agencies were heavily involved in the Revision Committee process.

Plaintiffs also note that the original November 13, 1991 meeting to decide whether or not the *Guide* needed revision included six federal agency representatives.[5/] These participants discussed issues such as timing, make-up of the *Guide* committee, and involvement of USDA personnel in the revision process.

Plaintiff also makes much of the fact that NIH and USDA incorporate and/or make reference to the *Guide* in their regulations. Finally, Plaintiffs intimate that Revision Committee members will be "responsive to NIH's needs" because some of the Committee members receive NIH grants.

These facts simply do not show sufficient "management or control" by the Defendant agencies to trigger applicability of FACA. First, the purpose of Dr. Wolfle's presentations at the meetings was to provide general information to agency representatives about the time-lines of various agency-funded projects, including the project to revise the *Guide*. He also presented new programs and ideas for which NAS might seek funding. Dr. Wolfle neither requested nor received substantive input regarding pending NAS projects at the IRAC meetings. *See* Deposition of Dr. Thomas L. Wolfle at 102-03, 105-08, 112.

Second, while it is true that agency representatives were present at one preliminary meeting, that is hardly indicative of government control of the Committee, even if there is

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5/ The federal officials were: Dr. Joan Arnoldi, USDA; Dr. Nelson Garnett, NIH; Dr. Don Gibson, NIH; Dr. Dennis Johnson, NIH; Dr. Stephen Potkay, NIH, and Dr. Leo Whitehair, NIH.

evidence that agency representatives offered specific suggestions at that meeting. The position of our Circuit is clear: "The word 'utilized' in FACA ... is a stringent standard, denoting something along the lines of *actual management and control* of the advisory committee." *Washington Legal Foundation*, 17 F.3d at 1450 (emphasis added). There is no evidence of such management or control.

Third, the question here is not whether the agencies make use of the Academy's end product; rather, it is whether *the Revision Committee* is "managed or controlled" by the agencies. *See Public Citizen* 491 U.S. at 452 (the interpretation of "utilized" is not to be determined by whether the Executive "makes use of" a committee's advice). Finally, as to whether there is bias toward the government, there is no suggestion—anywhere—that the NIH has ever sought to influence any particular conclusion or substantive recommendation and, in any event, the Committee's draft will be subject to independent review and ultimate approval by the Academy, not the government agencies.

Applying the holdings of *Food Chemical News* and *WLF* to this case, the Court agrees with Defendants that the Revision Committee is not "utilized" by the Defendant agencies. The Defendant agencies did not "manage" or "control" the Revision Committee to the extent required by *Food Chemical* and *WLF*. At most, Plaintiffs have shown that Defendants *influenced* the process. But because "influence is not control," *WLF* at 1451, Defendants' involvement is inadequate to trigger FACA coverage.[6/]

[6/] Plaintiffs have raised serious issues regarding the continued vitality of FACA if the "utilized" prong is read so narrowly. They may be correct that the statute loses much of its bite under the current interpretations by the Supreme Court and our Circuit. FACA has spawned much litigation,

(continued...)

* * * * *

In summary, Defendant agencies neither "established" nor "utilized" the Revision Committee under FACA. Defendants did not "establish" the Revision Committee because the Committee was not formed by the government agencies; it was formed by the Academy, who "proposed the panel, and alone selected its members." *Food Chemical News*, 900 F.2d at 333. Similarly, Defendants did not "utilize" the Committee because while they may have had some influence during the revision process, they exerted neither the "management" nor "control" required to trigger FACA.

VI. The "Quasi-Public" Test Under FACA

Plaintiffs also argue that the "management and control" test of the "utilize" prong does not apply to the Academy because it is a "quasi-public" organization, and any committee formed by a "quasi-public" organization is subject to FACA. In support, Plaintiffs cite the Supreme Court's decision in *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989). In *Public Citizen*, the Supreme Court was confronted with the claim that the Standing Committee on the Federal Judiciary of the American Bar Association ("ABA Committee"), which evaluates prospective judicial nominees for the Department of Justice, was subject to FACA. The Court ultimately held that FACA did not apply because the ABA Committee was not "utilized" by the President or the Department of Justice. However, the Court made specific

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[6/](...continued)
in large part, because its key terms are vague and difficult to apply. However, this Court is bound by the decisions of the Supreme Court and this Circuit, and until Congress acts to clarify the statute, we must interpret "utilize" as we have done today.

reference to the Academy in its discussion of the legislative history of FACA:

> The phrase "or utilized" therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences "for" public agencies as well as "by" such agencies themselves.

Id. at 462. Plaintiffs argue that the case at bar is indistinguishable from this language; indeed, they argue that this case is *precisely* the language quoted. That is, the Supreme Court has held that FACA applies to advisory groups "formed indirectly by quasi-public organizations ... 'for' public agencies," and because the Academy is a "quasi-public" organization that formed the Revision Committee for federal agencies, FACA applies. In effect, Plaintiffs argue that *Public Citizen* creates an alternative test for establishing whether a particular advisory entity is being "utilized." In addition to the "management and control" test, *supra*, Plaintiffs contend that FACA applies to any advisory committee (1) formed by a "quasi-public" organization: (2) "for" a public agency.

Defendants counter by arguing that the applicability of FACA to the Academy was not before the Court in *Public Citizen*, and, therefore, its statements concerning the Academy are mere *dicta*, not binding on this court. As Defendants correctly note, the Academy was not a party in *Public Citizen*, the Academy did not file a brief with the Court, and the status of Academy committees under FACA was not at issue.

There is force to Defendants' argument. Indeed, our Court of Appeals seemed to recognize as much when it noted that the Supreme Court's characterization of the Academy as "quasi-public" was not central to the *Public Citizen* holding. Commenting on the *Public Citizen* decision, then-Judge Ginsburg said in *Food Chemical News* that

> [t]he Court mentioned in passing that "utilized by" expanded the term" established" so as to make FACA applicable to advisory committees formed by "quasi-public organizations such as the National Academy of Sciences" (citation omitted). We note, but express no opinion on, the position pressed by the National Academy of Sciences ... that FACA's legislative history evidences a general intent to exclude from coverage the committees of the Academy.

Food Chemicals, 900 F.2d at 333 n.4.

Of course, the Supreme Court's holdings are binding precedent on all courts. But the Supreme Court itself has said that it "is to the holdings of our cases, rather than their dicta, that we must attend." *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S.Ct. 1673, 1677 (1994); *see also Kastigar v. United States*, 406 U.S. 441, 454-455 (1972) ("The broad language in [an earlier Supreme Court opinion] relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority"). It is clear that the Court's characterization of the Academy was not necessary to the Court's opinion in *Public Citizen*; whether the ABA committee was subject to FACA could have been decided without referring to the Academy's status. Also, it is undisputed that the status of the Academy was not before the Court, and the issue was not briefed for the Court.

Assuming *arguendo*, however, the existence of a "quasi-public" test, the Court must determine: (1) whether the Academy is a "quasi-public" entity; and, if so (2) whether the Revision Committee was created "for" the Defendant agencies.[7/]

There is little case law directly on point to guide the Court on the first question,[8/] but the Supreme Court's recent decision in *Lebron v. National RR, Passenger Corp.*, 115 S.Ct. 961 (1995) is highly instructive. In *Lebron*, the Court considered whether Amtrak was a government entity for purposes of the First Amendment. Amtrak claimed that because it was a "for profit corporation" under its authorizing statute, 45 U.S.C. § 541, it was not a government entity for First Amendment purposes. The Court disagreed, holding that Congress could not, through Amtrak's authorizing statute, determine the constitutional rights of citizens affected by its actions. "If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment." *Id.* at 971.

[7/] In *Food Chemical News*, the court seemed to indicate that a different standard might apply to "quasi-public" entities. In holding that the expert panel created by FASEB was not subject to FACA, then-Judge Ginsburg reasoned that "FASEB is a private organization and government contractor; *it does not have 'quasi public' status*," *id.* at 333 (quoting *Public Citizen*, 491 U.S. at 462) (emphasis added).

[8/] Although our Circuit has characterized the Academy as a "private, non-governmental, non-profit corporation," *Herbert v. National Academy of Sciences*, 974 F.2d 192, 193 (D.C. Cir. 1992), Plaintiffs correctly point out that just as in *Public Citizen*, the status of the Academy was not at issue in *Herbert*, nor did the Court of Appeals give any substantive analysis to the Academy's status. *Id.*

But the Court also said that Amtrak's authorizing statute was "assuredly dispositive of Amtrak's status ... for purposes of *matters that are within Congress' control—for example ... the Federal Advisory Committee Act.*" *Id.* at 971 (emphasis added). In other words, because FACA is within Congress' control, whether the Academy is covered by the statute is best determined by the Academy's designation under its authorizing statute.

For our purposes, the import of the Court's analysis in *Lebron* is that the National Academy of Sciences was designated by Congress as a "*private corporation* established under Federal law." 35 U.S.C. § 1101 (emphasis added). *Lebron* holds that this Congressional designation is "dispositive" of the Academy's status under FACA, namely, that it is "private" rather than "public" or "quasi-public."

Plaintiff counters that the Academy is quasi-public because it was created by Congressional charter, and because 65% of NAS projects are funded by the government. Of course, Plaintiff also argues that the Supreme Court's *dicta* in *Public Citizen* should bind this Court.

Plaintiffs' arguments are not persuasive. The fact that the Academy was chartered by Congress is insignificant because in 1863, when Congress issued NAS its corporate charter, Congress exercised exclusive power over all acts of incorporation in the District of Columbia, so even run-of-the-mill private corporations were chartered by Congress. *See Lombardo*, 397 F. Supp. at 794. Moreover, the fact that the Academy receives about 65% of its funds from the federal government proves nothing, because all government funds provided to the Academy are awarded pursuant to contracts, grants and cooperative agreements, which require the Academy to perform particular studies or research projects in exchange for such funds. Declaration of Dr. E. William

Colglazier ¶ 10 ("Colglazier Decl."). Indeed, by Plaintiffs' logic, *any* private organization that received funds from the government through a contract (e.g. the Boeing corporation) would become "quasi-public." That is surely not what Congress intended.

Finally, for reasons already discussed, Plaintiffs' reliance on the Supreme Court's language in *Public Citizen*, is misplaced. This Court has had the benefit of full briefing on the issue, and Defendants have pointed to a number of facts, many of which may not have been before the Supreme Court in *Public Citizen*, evidencing the private nature of the Academy. For example, the Academy has no vested regulatory authority, has no power to implement its own recommendations, and lacks authority to impose any governmentally enforceable sanctions. Def.-Int. Motion at 23; Colglazier Decl. ¶ 10. Further, the government has no seats on the Academy's board, and has no voice in choosing the officers or appointing the members of its committees. *Id.* The Academy's charter allows it alone "to make its own organization," "to fill all vacancies," and to provide for "all other matters needful or usual." 36 U.S.C. § 252. Moreover, the IRS recognizes the Academy as a 501(c)(3) organization, 26 U.S.C. 501(c)(3), and has described it as a "non-governmental corporation." *See* Rev. Rul. 75-30, 1975-1 C.B. 235. Finally, the Academy's officers and employees are not employees of the United States government, Congress has recognized the Academy as a "private corporation established under Federal law" 36 U.S.C. § 1101, and the Academy is not covered by Title V of the United States Code, which governs civil service employees. 5 U.S.C. § 2101 *et. seq.*

Considering these factors, as well as the Supreme Court's recent decision in *Lebron*, the Court finds that the Academy is not a quasi-public entity for purposes of FACA.[9/]

VII. Conclusion

For all the reasons stated above, the Court finds that the Revision Committee of the National Academy of Sciences is not subject to the Federal Advisory Committee Act. Accordingly, Plaintiffs' Motions for Summary Judgment and Permanent Injunction are **denied**, and Defendants' and Defendant-Intervenor's Cross Motions for Summary Judgement are **granted**.

12/20/95
Date

s/ Gladys Kessler
Gladys Kessler
U.S. District Judge

9/ Because the Academy is not a quasi-public entity, the Court need not reach the second part of the "quasi-public" test, namely, whether the Revision Committee was established "for" the Defendant agencies.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL LEGAL DEFENSE FUND et al.,	:	
Plaintiff,	:	
v.	:	
DONNA SHALALA, et al.,	:	Civil Action No. 94-1003 (GK)
Defendants,	:	
and	:	[Filed Dec. 20, 1995 Clerk, U.S. District Court District of Columbia]
NATIONAL ACADEMY OF SCIENCES,	:	
Defendant-Intervenor.	:	

ORDER

This matter is before the Court on Plaintiffs' Motions for Summary Judgment and Permanent Injunction and Defendants' and Defendant-Intervenor's Cross Motions for Summary Judgment. Upon consideration of the Motions, Oppositions and Replies, and oral argument in open court, it is this 20th day of December, 1995, hereby

ORDERED that Plaintiffs' Motions for Summary Judgment and Permanent Injunction are **denied**; and it is further

ORDERED that Defendants' and Defendant-Intervenor's Motions for Summary Judgment are **granted**.

s/ Gladys Kessler
Gladys Kessler
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed May 6, 1997

No. 96-5011 September Term, 1996

Animal Legal Defense Fund, Inc., et al.,
Appellants

v.

Donna E. Shalala, in her official capacity as Secretary, et al.,
Appellees

BEFORE: Siberman, Ginsburg and Sentelle, Circuit Judges

ORDER

Upon consideration of appellees' petitions for rehearing and of the response thereto, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed May 6, 1997

No. 96-5011

ANIMAL LEGAL DEFENSE FUND, INC. ET AL.
APPELLANTS

v.

DONNA E. SHALALA, ET AL.
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(94cv01003)

ON APPELLEES' SUGGESTIONS FOR REHEARING *EN BANC*

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, AND GARLAND,* *Circuit Judges*

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* *Circuit Judge* Garland did not participate in this matter.

ORDER

Appellees' Suggestions for Rehearing *En Banc*, and the response thereto, have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is,

ORDERED, by the Court, that the suggestion be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

Circuit Judges WALD and TATEL would grant the suggestion.

Separate statement filed by *Circuit Judge* SILBERMAN, concurring in the denial of rehearing *en banc*.

Separate statement filed by *Circuit Judge* WALD, dissenting from the denial of rehearing *en banc*, in which *Circuit Judge* TATEL joins.

SILBERMAN, *Circuit Judge*, concurring in the denial of rehearing *en banc*: The government and the National Academy of Sciences' (NAS) basic argument for rehearing is that we improperly relied on the Supreme Court's discussion in *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989), of the quasi-public characteristics of organizations

whose advisory committees are covered by FACA if created for and employed by the federal government (therefore "utilized"). This discussion is said to be "mere dicta," not at all binding on lower courts. Therefore whether an advisory committee is created by a quasi-public organization or not, it is only covered by FACA as "utilized" by the government if it is subject to the government's management and control, which is a separate test that we have developed to deal specifically with advisory committees that are *not* formed by "quasi-public" organizations. *See Washington Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446, 1450-51 (1994); *Food Chem. News v. Young*, 900 F.2d 328, 332-33 (D.C. Cir.), *cert. denied*, 498 U.S. 846 (1990). I think our opinion makes quite clear why the Court's discussion cannot be regarded as dicta. It is instead the core logic of the Court's effort to determine the meaning of the word "utilize" as used in FACA.

It is worth adding in response to the petition, however, that if the Supreme Court had meant to limit *all* advisory committees covered by the Act because they are "utilized" (if not established) by the government to those actually managed and controlled by the government, there would have been no need for the Court to have explained at length that in its view Congress had committees of quasi-public organizations in mind when it referred to "utilized" by the government. It would have been quite sufficient to have simply held that the ABA Standing Committee was not "utilized" by the government because it was not managed or controlled by the government. Nor would we have said in *Food Chemical*, interpreting *Public Citizen*, that the advisory committee there was neither "'amenable to [any] management' by an agency *nor* "'by [any] semiprivate entity the Federal Government helped bring into being.'" 900 F.2d 333 (quoting *Public Citizen*, 491 U.S. at 458, 463).

Accordingly, appellees' contention that the Supreme Court's reasoning is to be disregarded in light of the undesirable policy consequences of imposing FACA on the NAS committees[1/] is equivalent to arguing that the reasoning of Supreme Court opinions should be treated by the lower courts generally as dicta, akin perhaps to Justice Scalia's view of the legislative history of statutes. Admittedly, the Supreme Court often seems to ignore the essential reasoning of its own opinions when it wishes to reach a desired policy outcome, but I would not have thought that a lower court (perhaps any court) is free, legitimately, to do so.

WALD, *Circuit Judge*, with whom *Circuit Judge* TATEL joins dissenting from the denial of rehearing *in banc*: Because I believe this is a case of major consequence, affecting as it does the transparency of the deliberations and the procedures of hundreds of committees set up under the auspices of the National Academy of Sciences, and because I also believe the issue of statutory construction is a close and difficult one not necessarily controlled by the admittedly relevant dicta contained in *Public Citizen v. Dept. of Justice*, 491 U.S. 440 (1989), I would hear the case *in banc*.

1/ The NAS contends that FACA thrusts upon its advisory committees certain burdensome requirements, including that its committee membership be "balanced." But the statutory provisions that the NAS cites for the latter point are inapplicable to it; section 5(b)(2) only covers "legislation establishing or authorizing the establishment of any advisory committee. . . ." And section 5(c) similarly deals with advisory committees "creat[ed]" by the President, agency heads, or other federal officials. As appellees' acknowledge, the Guide Committee was established exclusively by the NAS.

APPENDIX F

1. The Federal Advisory Committee Act, 5 U.S.C. App. II, provides:

§ 1. Short title

The Act may be cited as the "Federal Advisory Committee Act".

§ 2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that—

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

§ 3. Definitions

For the purpose of this Act——

(1) The term "Administrator" means the Administrator of General Services.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is——

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of Title 5.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

§ 4. Applicability; restrictions

(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by—

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

§ 5. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall --

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the data for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

§ 6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress

stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

§ 7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(a) The Administrator shall establish and maintain within the General Services Administration a Committee Management

Secretariat, which shall be responsible for all matters relating to advisory committees.

(b)The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine——

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidelines to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means

of improving the performance of advisory committees whose duties are related to such agency.

(d) (1) The Administrator after study and consultation with the Director of the Office of Personnel Management, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that——

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of Title 5, United States Code;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service; and

(C) such members——

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)), and

(ii) who do not otherwise qualify for assistance under section 3102 of Title 5, by reason of being an employee of an agency

(within the meaning of section 3102(a)(1) of such Title 5),

may be provided services pursuant to section 3102 of such Title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent——

(A) an individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Administrator shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

§ 8. Responsibilities of agency heads; Advisory Committee Management Officer, designation

(a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall——

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

§ 9. Establishment and purpose of advisory committees; publication in Federal Register; charter; filing, contents, copy

(a) No advisory committee shall be established unless such establishment is——

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head or agency involved after consultation with the Administrator with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon

which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of such charter shall also be furnished to the Library of Congress.

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a) (1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with an advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which

were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

§ 11. Availability of transcripts; "agency proceeding"

(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

§ 12. Fiscal and administrative provisions; recordkeeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides

otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

§ 13. Responsibilities of Library of Congress; reports and background papers; depository

Subject to section 552 of title 5, United States Code, the Administrator shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

§ 14. Termination of advisory committees; renewal; continuation

(a) (1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless——

> (A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or
>
> (B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless——

(A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b) (1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

§ 15. Effective date

Except as provided in section 7(b), this Act shall become effective upon the expiration of ninety days following October 6, 1972.

2. 36 U.S.C. §§ 251-254 provide:

§ 251. Louis Agassiz, Massachusetts; J.H. Alexander, Maryland; S. Alexander, New Jersey; A.D. Bache, at large; F.B. Barnard, at large; J.G. Barnard, United States army, Massachusetts; W.H.C. Barlette, United States Military Academy, Missouri; U.S. Boyden, Massachusetts; Alexis Caswell, Rhode Island; William Chauvenet, Missouri; J.H. C. Coffin, United States Naval Academy, Maine; J. A. Dahlgren, United States navy, Pennsylvania; J.D. Dana, Connecticut; Charles H. Davis, United States navy, Massachusetts; George Engelmann, St. Louis, Missouri; F.F. Frazer, Pennsylvania; Wolcott Gibbs, New York; J.M. Gilless, United States navy, District of Columbia; A.A. Gould, Massachusetts; B.A. Gould, Massachusetts; Asa Gray, Massachusetts; A. Guyout, New Jersey; James Hall, New York; Joseph Henry, at large; J.E. Hilgard, at large, Illinois; Edward Hitchcock, Massachusetts; J.S. Hubbard, United States naval observatory, Connecticut; A.A. Humphreys, United States army, Pennsylvania; J.L. Le Conte, United States army, Pennsylvania; J. Leidy, Pennsylvania; J.P. Lesley, Pennsylvania; M.F. Longstreth, Pennsylvania; D. H. Mahan, United States Military Academy, Virginia; J.S. Newberry, Ohio; H.A. Newton, Connecticut; Benjamin Peirce, Massachusetts; John Rodgers, United States navy, Indiana; Fairman Rogers, Pennsylvania; R.E. Rogers, Pennsylvania; W.B. Rogers, Massachusetts; L.M. Rutherford, New York; Joseph Saxton, at large; Benjamin Silliman, Connecticut; Benjamin Silliman, junior, Connecticut; Theodore Strong, New Jersey; John Torrey, New York; J.G. Totten, United

States army, Connecticut; Jeffries Wyman, Massachusetts; J.D. Whitney, California, their associates and successors duly chosen, are incorporated, constituted, and declared to be a body corporate, by the name of the National Academy of Sciences.

§ 252. The National Academy of Sciences shall have power to make its own organization, including its constitution, by-laws, and rules and regulations; to fill all vacancies created by death, resignation, or otherwise; to provide for the election of foreign and domestic members, the division into classes, and all other matters needful or usual in such institution, and to report the same to Congress.

§ 253. The National Academy of Sciences shall hold an annual meeting at such place in the United States as may be designated, and the academy shall, whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art, the actual expense of such investigations, examinations, experiments, and reports, to be paid from appropriations which may be made for the purpose, but the academy shall receive no compensation whatever for any services to the Government of the United States.

§ 254. The National Academy of Sciences, incorporated by this chapter, be, and the same is, authorized and empowered to receive, by devise, bequest, donation, or otherwise, either real or personal property, and to hold the same absolutely or in trust, and to invest, reinvest, and manage the same in accordance with the provisions of its constitution, and to apply said property and the income arising therefrom to the objects of its creation and according to the instructions of the donors: *Provided, however*, That the Congress may at any time limit the amount of real estate

which may be acquired and the length of time the same may be held by said National Academy of Sciences.

3. 36 U.S.C. § 1101 provides in pertinent part:

The term "private corporations established under Federal law" as used in this chapter means the following organizations:

* * *

(32) National Academy of Sciences.

* * *

Supreme Court, U.S.
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No. 97-208

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

National Academy of Sciences,

Petitioner,

v.

Animal Legal Defense Fund,
Psychologists For The Ethical Treatment
Of Animals, And Association Of
Veterinarians For Animal Rights,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICI CURIAE SUBMITTED BY 84 PROMINENT SCIENTISTS IN SUPPORT OF PETITIONER

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October 3, 1997

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QUESTIONS PRESENTED

1. Is certiorari warranted to review a court of appeals' decision that misinterprets *Public Citizen* and holds that the nation's leading scientific institution must comply with the Federal Advisory Committee Act?

2. Did the Court in *Public Citizen* misconstrue the role committees play in Academy scientific studies, thereby leading the court of appeals to misapply dicta in *Public Citizen* and cripple the ability of the Academy to provide independent, objective analyses for the use of Congress, agencies, the courts, states, and international bodies?

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 84 prominent American scientists, physicians, and engineers, including 58 Nobel Laureates, two former Cabinet members, four former science advisers to the President, and 15 former high federal officials. *Amici* are named in the attached List of *Amici Curiae*. *Amici* have served on Academy committees, boards, and commissions, including the Academy's Report Review Committee and the Academy's Governing Board. *Amici* have provided anonymous peer reviews of draft studies through the Academy's internal report review process. Several *amici* have played prominent roles in the federal government, which is a beneficiary of Academy studies. Most *amici* are elected members of the National Academy of Sciences, the National Academy of Engineering, or the Institute of Medicine. The description of the Academy process set out in this brief is based on *amici's* direct experience with the Academy process.

Through association with the Academy, *amici* have insights that may aid the Court in determining whether the questions presented are of sufficient importance to warrant review by this Court. *Amici* have filed this brief in support

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[1] Pursuant to Supreme Court Rule 37, the following parties have contributed financially to the preparation of this brief: The Robert Wood Johnson Foundation, the American Association for the Advancement of Science, the Salk Institute, the Marine Biological Laboratory, the Southwest Foundation for Biomedical Research, the Carnegie Institution of Washington, the Chemical Manufacturers Association, the Pharmaceutical Research and Manufacturers of America, the American Physical Society, the Association of American Medical Colleges, Cold Spring Harbor Laboratories, and the Fred Hutchinson Cancer Research Institute. Counsel for a party did not author this brief in whole or in part.

of the petition for a writ of certiorari because they believe that the decision of the United States Court of Appeals for the District of Columbia Circuit, if left to stand, will undermine the important role the Academy has historically played in providing scientific studies to the government, scientific and educational institutions, and other private and public stakeholders.

SUMMARY OF ARGUMENT

Certiorari should be granted to avoid impairing the Academy's ability to provide independent, objective studies on scientific and technical issues of national and international importance. The Academy petitions for a writ of certiorari because the D.C. Circuit misapplied the Court's reasoning in *Public Citizen v. Dept. of Justice, et al.*[2] by relying on dicta in that case as if they were controlling to hold that Academy committees must meet FACA's requirements.[3] *Amici* respectfully seek to clarify for the Court the purpose of the Academy and the carefully delineated role committees play in assisting the Academy in performing scientific studies for the federal government. *Amici* believe that their explanation of the Academy and its process for providing scientific information and guidance to federal agencies will convince the Court that Academy committees are not covered by FACA.

The Academy strictly separates its committees from the agencies that fund some of its work. The Academy

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2 491 U.S. 440 (1989).

3 *Animal Legal Defense Fund v. Shalala*, 104 F.3d 424, *reh'g en banc denied*, 114 F.3d 1209 (D.C. Cir. 1997) (relying on Supreme Court's characterization in *Public Citizen* to find NAS is "quasi-public" organization and subject to FACA).

process requires its complete control over committee membership and agendas, independence from outside influence during committee deliberations, and peer review of the resulting report by a group of independent experts. FACA would require federal agency, not Academy, control over federally-funded committees and would inject the federal government into every aspect of committee meetings and deliberations, including approval of the creation of a committee, scope of inquiry, meeting agendas, and presentation of results. Certiorari is warranted, because if deprived of control over its committees and of independence from funding agencies, the Academy process would not survive application of FACA.

THE NATURE OF THE NATIONAL ACADEMY OF SCIENCES

The National Academy of Sciences enjoys an exceptionally high standing among domestic and international scientific organizations.[4] Honorific functions aside, the Academy's primary service is provision of scientific and technical studies on issues of national importance. The Academy performs studies no other presently existing institution can accomplish. The integrity of the Academy's procedures and the credibility, objectivity, and independence of its work are the Academy's principal strengths. These strengths have enabled the Academy to

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[4] Today, the Academy complex consists of the National Academy of Sciences ("NAS"), the National Academy of Engineering ("NAE"), the Institute of Medicine ("IOM"), and the National Research Council ("NRC"). Hereinafter, reference to the Academy includes all four organizations, but especially the NRC and IOM, which are the two organizations most likely to propose that a committee be formed in aid of the performance of a study. The NAS, NAE, and IOM honor outstanding men and women of science, engineering, and medicine with elected membership.

serve the government and the public with distinction for over 130 years.

Academy reports are a clarifying force on issues that threaten to produce confusing and scientifically misinformed public debate. Six Academy studies illustrate the breadth of the contribution such studies make to scientifically sound resolution of important public issues. A 1993 Academy report addressed the potential risks to infants and children posed by pesticides in the nation's food supply.[5] Because it involved children's health, food safety, and significant economic impacts, this Academy study received extraordinary coverage in the press and television news media.[6] The Academy examined the safety of National Aeronautics and Space Administration's space shuttle rocket boosters in the wake of the 1986 Challenger accident which generated wide public debate over the pace of the nation's space exploration program.[7] The Academy addressed the science relevant to AIDS transmission, the dimensions of the AIDS epidemic, treatment, and public education in a major 1986 report.[8] Amidst controversy over the accuracy of the

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[5] National Research Council, *Pesticides in the Diets of Infants and Children* (1993).

[6] See, e.g., Marian Burros, *U.S. Will Focus on Reducing Pesticides in Food Production*, N.Y. Times, June 27, 1993 at 1, col 5; Daniel P. Puzo, *Report Calls for Reform of Pesticide Regulations*, L.A. Times, July 8, 1993 at H-7, col 1; *Prudence, Not Panic, on Pesticides*, Chicago Tribune, July 24, 1993 at 18, col 1 (editorial); NBC Nightly News (NBC television broadcast, June 27, 1993).

[7] National Research Council, *Post-Challenger Evaluation of Space Shuttle Risk Assessment and Management* (1988).

[8] Institute of Medicine, National Academy of Sciences, *Confronting AIDS: Directions for Public Health, Health Care, and Research* (1986); Steven Findlay, *AIDS: Education Can Curb the*

U.S. Census, the Academy conducted a study that addressed whether a technically redesigned census that relied more heavily on estimates using certain sampling and statistical techniques might be more accurate and cost-effective than current methods.[9] Another, widely-anticipated Academy study confirmed that the scientific basis for the forensic use of DNA evidence is valid and recommended new ways of interpreting DNA evidence to assist judges and jurors in resolving how likely it is that two matching samples came from different persons.[10] Thus, courts as well as Congress and agencies benefit from Academy studies. The Supreme Court of Washington recently affirmed a murder conviction which it had previously reversed and remanded, based upon this Academy report.[11] An Academy report addressed

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"Epidemic", USA Today November 6, 1986, at D-4, col 1; Joseph Palca, *Academies Demand Urgent Public Education*, 324 Nature 3, Nov. 6, 1986; *Stern Voice on AIDS*, L.A. Times, Nov. 3, 1986, at Pt. 2, p. 4, col 1 (editorial).

9 National Research Council, *Modernizing the U.S. Census* (1994).

10 National Research Council, *The Evaluation of Forensic DNA Evidence* (1996).

11 As the court stated:

> In 1993, this court accepted the proposition that an absolute identification of an individual could be made based upon DNA analysis provided that the technology exists to do so, because, except for identical twins, each individual's DNA is unique. *State v. Cauthron*, 120 Wash.2d 879, 900, 846 P.2d 502 (1993). At the time *Cauthron* was decided, we understood that this stage of technology would exist only when the entire DNA molecule could be compared to another entire DNA molecule. Id. It is now apparent that is not the case, as explained in the newest report of the National Research Council's Committee on DNA Forensic Science. That report...states: "The match probability computed in forensic

specific steps which could reduce the risks to international security posed by some 50 tons of excess plutonium contained in nuclear weapons to be dismantled under international agreements.[12] These six illustrative studies have in common a high degree of scientific and technical content on which the study depends, highly interested stakeholders with varying points of view, congressional, judicial, or executive agency need for scientific guidance, and a high level of public concern caused in part by controversy or confusion about the scientific bases for policies that may have been advanced to address the topic of study.

The credibility and usefulness of Academy studies are widely acknowledged, but exactly how the Academy prepares its studies has not been well understood by Congress, the courts, and the public. The Academy operates independently from its funding sources and diligently protects its internal processes. The Academy has developed each aspect of this process to ensure that its deliberations are insulated from funding organizations, that it produces scientifically accurate and impartial work, and that any final study meets high standards for quality, completeness, and objectivity. As the Academy has recognized:

> analysis refers to a particular evidentiary profile. That profile might be said to be unique if it is so rare that it becomes unreasonable to suppose that a second person in the population might have the same profile." National Research Council, Commission [sic] on DNA Forensic Science: The Evaluation of Forensic DNA Evidence 136 (1996).

Washington v. Buckner, 941 P.2d 667 (August 14, 1997) (*en banc*).

[12] National Academy of Sciences, *The Management and Disposition of Excess Weapons Plutonium* (1994).

> Although public officials seek objectivity and independence when they approach the [NRC] for assistance, many remain uncomfortable with the process because the recommendations of the study cannot be predicted. NRC procedures that ensure objectivity include the sole right by the Research Council to appoint committees, no release of findings and recommendations until the work has undergone internal NRC review, and conduct of work in executive session.

National Academy of Sciences, et al., *The Policy Partnership with the U.S. Government* 18 (1988) (hereinafter "*Policy Partnership*").

The Academy weighs existing scientific studies and renders "weight of the evidence" syntheses of available scientific knowledge. The Academy attempts to dispel ignorance about science and thus to create a framework for intelligent policy development. In this sense the Academy functions as an arbiter of the state of science on an issue using the processes of scientific analysis, discussion, and consensus. Its role is not to accommodate interests but to inform them. As scientists, *amici* are concerned that the court of appeals' decision may compromise the Academy's role by injecting a measure of federal control that is neither legally warranted nor compatible with the independent scientific analyses which the Academy provides.

REASONS FOR GRANTING THE PETITION

The Academy cannot reconcile its process with the fundamentally inconsistent mandates of FACA. FACA requires agency control over every aspect of its advisory committees, balancing of committee members' points of

view, and public committee meetings and records. These three mandates are the antithesis of four key components of the Academy process: independence from funding entities; selection of committee membership for scientific expertise; conduct of final committee deliberations free from external influence or pressure; and committee service, not to the federal government, but to the Academy itself. Without these elements, the Academy cannot produce the type or quality of studies it has performed for over 130 years.

I. From Beginning to End, the Academy Process is Incompatible with the Mandates of FACA

The Academy has refined a process over decades to provide answers that are as definitive as possible to scientific questions of national importance. In study development, the Academy and sponsoring agency agree on the study concept and negotiate terms. In the deliberations phase, the Academy may assemble a committee to generate a report on the issue to be studied. In this phase, the Academy controls the study, insulating it from interference by sponsors and interest groups. Finally, during anonymous peer review of committee drafts, the Academy's report review process, overseen by the Report Review Committee ("RRC"), invests considerable effort to ensure that reports issued in the Academy's name accurately present the state of science on the topic of study. This basic process antedates both the enactment of FACA and the case now before the Court, as well as the Court's 1989 decision in *Public Citizen*, although this process was not described or presented to the Court in *Public Citizen*.

A. The Academy's Primary Role in the Initiation of Studies is Inconsistent with FACA

The Academy begins by developing a study concept and statement of task. Study concepts may originate with agencies, but also with Congress, state and foreign governments, private entities, and the Academy's own oversight and governing entities. Academy staff consult with potential sponsors,[13] but the Academy controls the scope of the study and the mission of the committee. Academy staff prepare study proposals, which Academy commissions, boards, and the Governing Board (including, *inter alia,* the Presidents of the NAS, NAE, and IOM) may, as the instance requires, review, amend, reject, or approve. This review analyzes whether the issues are amenable to scientific and technical analysis, whether the issues have national application, whether the study will contribute to the national dialogue, and whether the study requires the unique abilities of the Academy. At any point, the Academy may reject a statement of task or study as inappropriate for Academy attention. The Academy and agency must then determine whether an alternative statement of task will satisfy the Academy's standards and the sponsor's needs.

The Academy enters into a contract, a grant, or cooperative agreement with sponsors to perform a study only

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[13] Often more than one agency sponsors an Academy study. Some studies are partially or wholly supported by private organizations or with internal Academy funds. In such situations, the Academy must take a lead role in study development to secure consensus among several agencies with possibly differing policy goals. *See Policy Partnership* at 18. Similarly, the Academy may find itself in the lead role where studies overlap multiple administrations with differing policy goals, or in the face of changing federal funding priorities. *See id.* at 18-20.

after the Academy has approved the study.[14] Any funding agency understands that the committee is only a part, albeit an important part, of the Academy process to produce a study. Academy guidelines prohibit agency selection of committee members or alteration of Academy procedures. Only the Academy can propose the use of a committee structure, if warranted by Academy guidelines, to conduct a study. The Academy may refuse to conduct studies that do not meet its standards.[15] Once it executes a funding agreement with the Academy, agency oversight of the study ends, as it must, to ensure objectivity.

B. The Academy's Selection of a Committee is the Antithesis of Committee Selection under FACA

The Academy selects a study committee through consultations involving its standing boards and commissions, staff, Academy members, and professional colleagues. Naming the committee is the sole responsibility of the Academy. Nominations remain secret from the sponsoring agency until the Academy President makes the final selections and the nominees agree to serve. In contrast, FACA appears to require the sponsoring agency to identify potential committee members and then balance advisory

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[14] Most grants and cooperative agreements are contractual in nature, i.e., they are *ad hoc*, study-specific agreements containing contract-like terms.

[15] *See, e.g.*, 42 U.S.C. § 288b(b)(2) (1994); *Lombardo v. Handler*, 397 F. Supp. 792, 794 and n. 12 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).

committee membership on the basis of "points of view" represented by the individuals identified. FACA §5(b)(2).[16]

Interest group balancing does not serve science; broad representation by scientific discipline does. Accommodation of interest groups in Academy committees would compromise the NRC's role as an objective arbiter of scientific fact. Respondents illustrate this point. They appear to desire representation on the Guide Review Committee for their particular moral, ethical, and political viewpoints. Interest group-based participation in committee deliberations would undermine the scientific objectivity and open-minded confrontation of issues that is necessary to serve national science policy needs.

Balancing committee memberships as FACA mandates would adversely affect the quality of scientific talent available to assess science relevant to federal policy making. This is because scientists, such as *amici*, while sometimes willing to serve on commissions balanced for interest group accommodation,[17] are far more willing to

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[16] Application of this FACA requirement to all Academy committees may be somewhat uncertain, but if it were to apply it would undermine the open-minded examination of issues central to the Academy process. Circuit Judge Silberman maintains that because the balancing requirement is placed in a section of FACA that is separate from other FACA requirements for direct agency control of committees, and only applies to legislatively mandated committees or committees "creat[ed]" by a federal entity, that requirement does not apply to committees established exclusively by the Academy. *Animal Legal Defense Fund v. Shalala*, 114 F.2d 1209, 1210 n. 1 (separate statement by Circuit Judge Silberman concurring in the denial of rehearing *en banc*).

[17] For an explanation of the interest-group accommodation model of administrative law, see generally Richard Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975).

participate in scientific inquiry conducted by the Academy. Scientists serve on Academy committees out of obligation to a national scientific institution that "belongs to science," i.e., that is governed entirely by and for scientists, not the federal government. By joining an Academy committee, scientists expect to participate in a collegial enterprise, undiluted by political considerations, that allows free and candid scientific discussion, without fear of retaliation in the press, by a funding agency, or otherwise. *Amici* are often asked to serve on FACA advisory committees. They are thus well aware of the distinction between serving on an Academy committee and a FACA committee.

Committee members do not perceive themselves as working for a sponsoring agency, or as members of an agency FACA committee. Rather, they engage in scientific inquiry to explore the extent of current scientific knowledge and exfoliate the science and scientific issues involved for colleagues and the public. Many scientists, including *amici*, have donated their time and services because of the special qualities of Academy studies but have not otherwise served on government committees.

C. To Ensure Scientific Objectivity, Academy Committee Meetings are Conducted in a Manner Inconsistent with FACA's Mandates

Under Academy oversight, the committee meets to discuss the statement of task, address potential sources of bias, set its agenda, assign responsibilities to individual committee members, and perform the study. The committee may hold open informational meetings or request submissions from interested parties. Yet committee deliberations on findings and recommendations are conducted in executive session, and the committee is enjoined by the Academy from

releasing draft reports, working papers, or other indications of the committee's conclusions to outside parties. On occasion the Academy's Executive Officer has had to enforce this requirement. At the conclusion of its deliberations, the committee submits its confidential draft report to the Academy.

In contrast, the sponsoring agency sets a FACA committee's agenda. FACA §10(e). Only a government officer or employee may call meetings of FACA committees, and a government official with authority to adjourn the committee must attend each meeting. FACA §10(f). The FACA committee reports directly to its sponsoring agency. No superior authority insulates the committee from the agency and reviews its work. Indeed, FACA strives for precisely the opposite result.[18] FACA committees must hold all of their meetings in public, and the agency sponsor must publish notice of the meetings in the Federal Register. FACA §10(a)(1), (2). FACA committees must keep detailed minutes of meetings and make committee records available for public review. FACA §10(b), (c).

It is difficult to imagine how the Academy could both comply with FACA and still maintain the quality, independence, credibility, and timeliness of Academy studies. For example, the Academy's committee on the Challenger accident met 99 times over 30 months on highly technical but also highly controversial subjects to address rocket booster redesign and shuttle safety. Independence from NASA's direct control was essential for the credibility of the study. FACA's meeting notice and agenda requirements alone would have prevented the committee

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[18] *See e.g., Public Citizen*, 491 U.S. at 457-59 (noting that Congress, in enacting FACA, sought to regulate more closely control of advisory committees by sponsoring agencies).

from meeting frequently or finishing its work as promptly as it did.[19]

In enacting FACA, Congress recognized the need to subject advisory committees to both public scrutiny and agency control to ensure that committee recommendations fairly represent the range of interests affected.[20] Yet, governmental control and premature scrutiny of an Academy committee's work would weaken the Academy's ability to provide objective scientific studies. Committee members must be free to explore candidly all lines of inquiry, subject to equally candid critiques by scientific peers. Public access to deliberative sessions and drafts would expose committee members to pressure from outside interest groups.

An Academy committee needs the freedom to change its conclusions and recommendations without embarrassment, based on comments received from the thorough peer review the Academy requires. Peer review usually results in some changes, and sometimes results in substantial modification or supplementation of a report. *Amici* know that committees have reversed their primary conclusions after receiving peer review comments through the Academy's report review process. A draft study of a controversial subject would be widely reported, creating the potential for confusion if peer review were to cause the Academy to revise the final report. The reality is that draft reports would be discussed in the press as if they were the soon-to-be-disclosed final conclusions of an Academy study, with the

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[19] See Norman R. Augustine, *When Politics Interferes with Science*, Washington Post, August 6, 1997, at A19, col 1.

[20] *See e.g. Public Citizen* at 453 (noting FACA was enacted in part to prevent biased reports); *c.f.* Stewart, *supra* note 17.

Academy helpless to undertake the quality review that is essential to completed Academy reports.

Many committee members, all of whom donate their services to the Academy, depend on agency grants and other funding for their own research. The confidentiality of committee deliberations protects individuals from agency retribution for unpopular study results. Also, many agencies that fund the Academy administer regulatory statutes. Academy studies may affect the scientific underpinning of regulatory standards and enforcement policy. Confidentiality protects committee deliberations where a sponsoring agency's regulatory mission may be implicated.

While confidentiality serves to ensure both frank exchange and the quality of final reports bearing the Academy's imprimatur, *amici* point out that Academy committees conduct initial public meetings to gather information and hear stakeholder perspectives. Further, at the end of the process everyone knows what the Academy has said, and why. No danger exists that the public will be deprived of knowing all of the recommendations of an Academy study. Virtually all Academy reports are published, and many are marketed to and extensively used by the public. The report is the *only* means the Academy uses to respond to a federal request. The Academy requires its reports to contain adequate background so a reader can understand the scientific foundations for the Academy's conclusions.

D. The Academy's Review of Study Drafts Goes Well Beyond Any Requirements of FACA to Ensure Accuracy and Objectivity

The Academy process is far from complete when the committee submits its findings and recommendations to the

Academy. The Academy confidentially circulates the committee report to an anonymous external peer review panel selected by the RRC on the recommendation of the relevant oversight units. Anonymous peer review serves both to confirm the accuracy and objectivity of the committee's work, and to check any tendency to stray from the committee's charge or to favor a sponsor's point of view. The peer reviews remain permanently anonymous. In contrast, FACA does not provide for any review to validate a FACA committee's work.

The Academy RRC reviews the committee's final report to determine if the committee has adequately responded to the peer review comments. The Governing Board and presidents of the NAS, NAE, and IOM may become involved in the final approval of committee reports. *Amici* are unaware of any other institution that provides scientific guidance to government that so thoroughly insulates its studies from sponsoring agencies in order to guarantee accurate, independent work.

Finally, Committee members know that their deliberations, should they survive the Academy's intense review, will ordinarily be published by the National Academy Press. Publications are usually edited to produce book-length reports for general public use that provide self-contained "primers" on the consensus of the scientific community regarding issues with a high technical and scientific content. Committee members are thus rewarded for their labors with publication of a report that allows informed national dialogue. Whether the sponsoring agency seriously considers their conclusions matters to committee volunteers, but this consideration is of secondary importance to *amici* (and, presumably, most committee members) as compared to a report's scientific accuracy.

The hallmarks of the Academy process are its reputation for objective research of the highest quality, independence from its sponsors, mobilization of scientific talent otherwise unavailable to government,[21] and control over every aspect of its work. These qualities are essential to the Academy's ability to complete reliable and accurate studies of the state of scientific knowledge on issues of national concern, and are reflected in every step of the Academy process. Application of FACA will cripple the Academy process and end the Academy's 134-year tradition of providing government and the public with objective, accurate, and reliable analyses of scientific issues.

II. The Court of Appeals Erred by Applying Dicta in *Public Citizen* as Controlling

Amici agree with Petitioner that the court of appeals bases its assertion that the Academy is a "quasi-public entity" on this Court's perception of the Academy expressed in *Public Citizen* (Petition, p. 16). The Court's characterization of an Academy committee as "the paradigmatic example" of a directly utilized committee that advises agencies (*Public Citizen*, 491 U.S. at 460) indicates that the Court misconstrued the role Academy committees play in Academy studies. *Amici* submit that had the Court had before it the explanation *amici* provide here, it would not have used the Academy as an example at all.

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[21] *Amici* point out that the NRC utilizes each year over 9,000 volunteer scientists, engineers, and other professionals in its committee system. The NRC committees represent over $27,000,000 in services provided at no cost to sponsors during the performance of studies. *See* National Academy of Sciences, *Questions and Answers About the National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and the National Research Council* 15-16 (1991).

A House Report, drafted two years before FACA, noted: "A great number of the approximately 500 advisory committees of [the Academy] *possibly should be*" included under FACA. H.R. Rep. No. 91-1731, at 15 (1970) (emphasis added). The Report further noted that the Academy provides advice to government and that "[t]his is done by the use of advisory committees." *Id.* As explained above, it is the *Academy* that advises government after the Academy has approved a study, monitored committee deliberations, and scrutinized the committee report. The proposition that Academy committees directly advise government contradicts every element of the Academy process that insulates the committee's deliberations from governmental interference and ensures that a final report is the product of the Academy itself.

Amici further agree with Petitioner that FACA's legislative history illustrates that Congress did not intend to apply FACA to Academy committees. Throughout the legislative process culminating in FACA, no representative of the Academy was asked to testify, despite Congress' awareness of approximately 500 committees that reported to the Academy on scientific studies. *See* H.R. Rep. No. 91-1731 at 15. The Academy was a bystander to the enactment of FACA because it was not part of the problem.

In enacting FACA, Congress was concerned in part about the needless cost of advisory committees. *See, e.g., Public Citizen*, 491 U.S. at 453. *Amici* note that Academy studies may be expensive, but they are not "wasteful." Committee members — prestigious scientists — serve for free. Several presidential administrations have recognized the unique value of Academy studies and authorized

executive agencies to forego competitive bidding in Academy contracts.[22]

FACA was also intended to address bias and agency capture by interest groups. *See, e.g., Public Citizen*, 491 U.S. at 446; *see also* Hearings on H.R. 4383 before the Subcommittee on Legal and Monetary Affairs of the House Committee on Government Operations, 92nd Cong., 1st Sess. (November 4, 1971) at 14 (statements of Sen. Metcalf) (characterizing advisory committees as "governmentally established and sanctioned trade associations"). Detailed Academy guidelines address potential bias and conflict-of-interest and require screenings in committee before a study begins. If a conflict becomes apparent, the Academy may ask the committee member to resign.

The Academy generally utilizes committees for well defined tasks, not for the open-ended activities Congress sought to correct with FACA. While the Academy has created standing committees that undertake a series of studies, typical Academy committees serve between six and twenty-four months and can accomplish a major study in as little as four months. *See* National Academy of Sciences, et al., *A Unique National Resource* 5 (1994). In the case at bar, the penultimate Guide Review Committee completed its work in 1985 and disbanded. *See Animal Legal Defense Fund v. Shalala*, No. 94-1003, *mem. op.* at 2 (D.D.C. Dec. 20, 1996). The Academy formed the latest Guide Review Committee only when the Academy recognized the need to update the Guide and entered into a funding contract with the sponsoring agencies. *See id.* at 2-3.

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22 *See, e.g.*, Exec. Order No. 12832, 3 C.F.R. 580 (1993), *reprinted in* 36 U.S.C. 253 n. (1994).

CONCLUSION

For the reasons stated herein, this Court should grant the Petition for a Writ of Certiorari. The Academy process for generating relevant, accurate, and objective studies cannot survive the court of appeals' decision to apply FACA to Academy committees. These committees are an important, but incomplete, part of a process, described fully in this brief, that the Academy has developed over decades to ensure that reports issued by the Academy provide Congress, the federal agencies, the courts, state and local governments, international organizations, and the public with independent, objective guidance on complex scientific and technical questions. The court of appeals' decision to apply FACA to Academy committees rests on dicta that mischaracterize the Academy in FACA's legislative history. By adopting these dicta as binding authority, the court of appeals misapplies the standards established by this Court in *Public Citizen.*

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(3)

No. 97-208

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL ACADEMY OF SCIENCES

Petitioner,

v.

ANIMAL LEGAL DEFENSE FUND, PSYCHOLOGISTS FOR THE ETHICAL TREATMENT OF ANIMALS, AND ASSOCIATION OF VETERINARIANS FOR ANIMAL RIGHTS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the "Guide Revision Committee," which was established to provide the National Institutes of Health, the United States Department of Agriculture, and other federal agencies with recommendations regarding the care and treatment of animals used in research, and which has operated under the auspices of the National Academy of Sciences, has been "utilized" as a federal advisory committee, within the meaning of the Federal Advisory Committee Act, 5 U.S.C. App. II § 3(2).

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Respondents Animal Legal Defense Fund, Psychologists for the Ethical Treatment of Animals, and Association of Veterinarians for Animal Rights oppose the petition for a writ of certiorari filed by the National Academy of Sciences ("NAS"). NAS's petition does not set forth all of the facts pertinent to the Court's consideration of NAS's petition. Accordingly, respondents will first set forth their counterstatement of the case and then explain why the Court should not grant review.[1]

COUNTERSTATEMENT

The specific issue resolved by the Court of Appeals was whether the government's use of a federally-funded committee established to provide the National Institutes of Health ("NIH") and other federal agencies with recommendations regarding the care and treatment of animals used in research, and which operated under the auspices of NAS, is subject to the public accountability requirements of the Federal Advisory Committee Act, 5 U.S.C. App. II ("FACA"). In this Court's only ruling concerning FACA, the Court determined that Congress added the word "utilized" to the Act's definition of an "advisory committee" in order to "clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups *formed indirectly by quasi-public organizations such as the National Academy of Sciences* 'for' public agencies as well as 'by' such agencies themselves." *Public Citizen v. Department of Justice*, 491 U.S. 440, 462 (1989) (emphasis added). The Court of Appeals faithfully applied this Court's definition of

[1] Respondents, which were plaintiffs in the district court and appellants in the D.C. Circuit, are three organizations consisting of lawyers and law students, veterinarians, and psychologists concerned with the humane treatment of animals in research, all of which have sought, and been denied, access to the documents and meetings of the advisory committee at issue.

"utilized" committees to conclude that the advisory arrangement here is subject to FACA.

1. FACA's Requirements

Congress passed FACA in 1972 to regulate the "growth and operation of the 'numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers of the Federal Government.' " *Ass'n of American Physicians and Surgeons v. Clinton*, 997 F.2d 898, 902-03 (D.C. Cir. 1993), quoting 5 U.S.C. App. II § 2(a). The Act defines an "advisory committee" to mean:

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof which is . . . (C) *established or utilized* by one or more agencies, *in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government*. . . .

5 U.S.C. App. II § 3(2) (emphasis added).

FACA requires that committees hold their meetings in public except for those closed or partially closed pursuant to specified exemptions, 5 U.S.C. App. II § 10(a)(1), that they keep minutes of each meeting, *see id.* at § 10(c), and that records not exempt under the provisions of the Freedom of Information Act, 5 U.S.C. § 552, be made available to the public. 5 U.S.C. App. II § 10(b). As summarized in the President's most recent published report to Congress on implementation of FACA:

> These provisions are designed to ensure that the ebb and flow of information to and from an advisory committee is maximized, and that committees are accountable to the public, two of the underlying rationales of FACA.

Twenty-Fourth Annual Report of the President on Federal Advisory Committees 1 (Fiscal Year 1995) (''President's FACA Report'').

Contrary to NAS's characterization, FACA does not mandate that the federal government ''control[]'' the work product of advisory committees subject to the statute. NAS Petition (''Pet.'') at 21. On the contrary, Congress required that agencies seeking advice should *not* ''inappropriately influence[]'' advisory committees but, rather, that any recommendations should be the ''result of the advisory committee's *independent* judgment.'' 5 U.S.C. App. II § 5(b)(3) (emphasis added).

2. This Court's Ruling in *Public Citizen*

In *Public Citizen*, this Court rejected the argument that the American Bar Association's Standing Committee on Federal Judiciary, which provides recommendations on judicial nominees to the Department of Justice, is ''utilized'' as an advisory committee. In an effort to avoid ''formidable constitutional difficulties'' that would be entailed if FACA were applied so as to interfere with the President's power to nominate federal judges, 491 U.S. at 466, the Court declined to adopt a ''straightforward reading'' of the statutory language. *Id.* at 453. Instead, the Court embarked on a detailed ''[c]onsideration of FACA's purposes and origins'' and paid ''[c]lose attention to FACA's history'' to ''ascertain the intended scope of the term 'utilize.''' *Id.* at 455, 456.[2]

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[2] The Court's analysis of the legislative history was based heavily on an *amicus* brief filed by several organizations in support of the government's position. *See* Brief of People for the American Way Action Fund *et al.*, *Public Citizen and Washington Legal Foundation v. Department of Justice*, Nos. 88-249, 88-494 (U.S. March 11, 1989).

This "careful review" of the Act's history, *id.* at 464, led the Court to conclude that "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals . . .." *Id.* at 453. In conducting its review of the legislative history, the Court focused on a 1970 House Report "which instigated the legislative efforts that culminated in FACA." 491 U.S. at 460.

That Report "complained that committees 'utilized' by an agency (as opposed to those established directly by an agency) rarely complied with the requirements of Executive Order 11007," a pre-FACA Order which regulated government advisory committees. *Id.*, citing H. Rep. No. 1731, 91st Cong., 2nd Sess. 15 (1970) (hereafter "1970 House Report"). As the Court observed, the House "Report's *paradigmatic example* of a committee 'utilized' by an agency for purposes of Executive Order 11007" — and which Congress therefore intended to ensure *was* covered by FACA — "*was an advisory committee established by a quasi-public organization in receipt of public funds, such as the National Academy of Sciences.*" 491 U.S. at 460 (emphasis added).

Based on these and similar statements, this Court reasoned that the phrase "or utilized" was added to FACA's definition of advisory committee "to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, *encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences 'for' public agencies as well as 'by' such agencies themselves.*" *Id.* at 462 (emphasis added). This review of FACA's history was indispensable to the Court's holding that the ABA committee was not being "utilized" by the Justice Department because, in sharp contrast to NAS committees, it was not "formed by . . . some *semi-private entity the Federal Government helped bring into being*," such as NAS.

Id. at 463 (emphasis added).

3. NAS's Status As A "Quasi-Public" Organization

As accurately labeled by this Court in *Public Citizen*, NAS is the "paradigmatic example" of a "*quasi*-public" or "*semi*-private entity the Federal Government helped bring into being" for the precise purpose of furnishing federal agencies with advice. 491 U.S. at 460, 462, 463 (emphasis added). Indeed, NAS was created by a Congressional charter, which provides that the "academy *shall, whenever called upon by any department of the Government,* investigate, examine, experiment, and *report upon any subject of science or art* . . .." 36 U.S.C. § 253 (emphasis added). Congress further provided that the "academy shall receive no compensation whatever for any services to the Government in the United States," but that the "actual expense of such investigations, examinations," and reports are "to be paid from appropriations . . .." *Id.* In other words, Congress has *required* that NAS furnish advice to the government upon request, and that the federal government pay for that advice.

While NAS now insists that it is *not* a "quasi-public" entity with a special status distinct from that of purely private organizations, Pet. at 17, this assertion is completely at odds with NAS's *own* longstanding description of itself, as well with its argument to this Court concerning its unique role in advising the federal government. Thus, in its own publications, the Academy has declared that it "has a *mandate that requires it to advise the federal government* on scientific and technical matters." NAS, *Report Review: Guidelines for Committees and Staff* 1. Court of Appeals Appendix ("C.A. App.") 188 (emphasis added).

In addition, NAS has stated that it has a "a *special*

relationship with the U.S. government because of its congressional charter and its *long history of support to the government as a quasi-independent ally.*" NAS, *The Policy Partnership With the U.S. Government* 17 (emphasis added) (C.A. App. 367). As the Academy has also observed, because "NAS was created by the federal government to be an adviser on scienfic and technological matters," it is not surprising that the "great majority of the studies carried out by the Academy complex are at the request of government agencies," and "usually are funded out of appropriations made available to federal agencies." NAS, *Questions and Answers About the National Academy of Sciences* 1. C.A. App. 541.

NAS has further explained that the National Research Council ("NRC") is the "main operating arm of the Academ[y] in conducting policy and technical studies for the federal government." C.A. App. 358. The NRC's "basic mission" is to "provide most of the services to governmental agencies and the Congress that are undertaken by the National Academy of Sciences" in its "role as adviser[] to the federal government." C.A. App. 549. The Research Council "does this primarily through its committee structure, calling upon a wide cross section of the nation's leading scientists" to serve on expert committees which advise federal agencies. *Id.*

The NRC, which was organized by NAS in 1916 "at the request of the President," has been the direct subject of several Executive Orders delineating its functions and activities. *See* E.O. 12832 (1993) (C.A. App. 264). In January 1993 — six months before the committee at issue in this case was formed — President Bush signed Executive Order 12832, which delineates what the functions of the NRC "shall be" and emphasizes that the "congressional charter of [NAS] charges it, *upon call from any U.S. Government Department*, to investigate, examine, experiment, and report upon any sub-

ject of science or art . . . .'' *Id.* (emphasis added).

NAS's prior assessment of itself as a ''quasi-independent'' advisor to the federal government, C.A. App. 367, is confirmed by its petition for certiorari. While criticizing *Public Citizen's* use of the terms ''quasi-public'' or ''semi-private'' to describe NAS, the Academy's petition simply reinforces those descriptions by stressing the ''continuing *need*'' of the Executive Branch to ''turn to NAS for expert advice'' — a need, according to the Academy, that ''*cannot* adequately be filled by any other identifiable source.'' Pet. at 21-22 (emphasis added).

4. The NAS Advisory Committee At Issue

a. As the Court of Appeals ruled, the intimate, longstanding advisory relationship at issue in this case is the quintessential example of an advisory committee ''formed indirectly by'' the ''National Academy of Sciences 'for' public agencies,'' at taxpayer expense. *Public Citizen*, 491 U.S. at 462. Hence, as the court below suggested, if *this* advisory arrangement is not covered by FACA, then there is no such creature as a ''utilized'' advisory committee and that statutory term is completely meaningless.

The federal defendants have legal duties to ensure that laboratory animals used for research purposes are treated in a proper and humane fashion. For example, the Health Research Extension Act, 42 U.S.C. § 289d, mandates that the Department of Health and Human Services (''HHS''), acting through the Director of NIH, establish guidelines for the ''proper care of animals to be used in biomedical and behavioral research'' and the ''proper treatment of animals while being used in such research.'' *Id.*

These guidelines are critical because recipients of federal

research monies must comply with them as a condition of obtaining federal funding. *Id.* The Department of Agriculture is also required by the Animal Welfare Act to develop standards for the humane care and treatment of animals used in research, *see* 7 U.S.C. § 2143(a), including, for example, the assurance of a "physical environment adequate to promote the psychological well-being of primates." *Id.* at § 2143(a)(2)(B).

b. For over four decades, committees of NAS/NRC have produced, for the federal government, the *Guide for the Care and Use of Laboratory Animals* (the "Guide"), which, as the title suggests, sets forth detailed advice and recommendations for the treatment of animals used in research. As explained by an NIH official, the Guide is widely regarded as the "most important single document used by Federal agencies with respect" to the care of research animals. C.A. App. 630.

For example, HHS "*requires* institutions who receive funding from NIH to use the Guide to develop and implement programs for activities involving animals." C.A. App. 813, citing Public Health Service Policy on Humane Care and Use of Laboratory Animals, 48 C.F.R. § 380.205. Indeed, the regulations specifically define the "Guide" as the "1985 Edition" — the version that preceded the one at issue — "*or succeeding revised editions*," 48 C.F.R. § 380.202(e) (emphasis added), so that as soon as the Guide is revised, the updated version of the recommendations is ***automatically incorporated into federal regulatory policy*** without any independent agency review of its content.

Even more sweepingly, an interagency committee consisting of representatives of all federal agencies that use animals in research — known as the Interagency Research Animal Committee — has expressly incorporated the Guide into government-wide "Principles for the Utilization and Care of

Vertebrate Animals Used in Testing, Research and Training." C.A. App. 263. In short, as characterized by NAS itself, "*[t]he Guide serves as the basis for policy on research animal care and use for all federal agencies*," and is heavily relied on by "regulators in development of federal standards on research animal care and use." NAS, *Organization and Members* 227 (1994) (emphasis added) (C.A. App. 73).

The Guide was first published in 1963 and has been revised on several occasions over the past three decades. Each such revision has been undertaken with federal funds, has identified a federal agency as the sponsor of the report, and has been prepared by an advisory committee of experts empaneled for the government by a subdivision of NAS/NRC known as the Institute of Laboratory Animal Resources.

The most recent such revision — prior to the one at issue here — was drafted in 1985 by fourteen members of the Committee on Care and Use of Laboratory Animals. *See Guide* (1985 revision) (C.A. App. 263). That edition is expressly identified on its cover as an "NIH Publication," and states that it was prepared by the NAS committee "*for* the National Institutes of Health" with federal funds. C.A. App. 217, 218 (emphasis added).

c. Following the 1985 revision of the Guide, there were significant developments involving the use of animals in research, including amendments to the Animal Welfare Act. *See* Pub. L. 99-198, Title XVII, § 1751, 99 Stat. 1645. Consequently, in November 1991, NAS officials met with representatives of federal agencies which had previously relied on the Guide, including "past sponsors" — *i.e.*, NIH and the Public Health Service — as well as the "Agriculture [Department] and others who look to the Guide for guidance in their animal care and use programs." C.A. App. 665.

At that meeting, NAS and federal officials agreed that a new version of the Guide "should be revised in the near future" by a committee of experts. C.A. App. 64. As summarized by an NAS official, a "key factor" in this decision was that the Guide "prepared by an expert committee of scientists [was] available when the law and regulations were written," and should continue to "be available" as federal decisionmakers revised their policies on care and use of animals in research. C.A. App. 137.

With regard to the composition of the Guide Committee, the federal and NAS officials discussed the general "constituencies to be represented," agreeing that

> *a balance of disciplines similar to that used for the last revision (1985) would be satisfactory.* That committee was comprised of laboratory animal veterinarians, research users (mostly Ph.Ds and M.D.s in several areas), and one high level academic administrator (M.D.).

C.A. App. 66 (emphasis added). The federal and NAS officials even discussed the "content" of the recommendations to be devised by the Committee and the "initial charge to the revision committee" regarding the specific issue of appropriate cage sizes for laboratory animals. C.A. App. 65; *see id.* ("revision committee will likely experience considerable pressure to modify [i.e., enlarge] cage sizes as it did during the last revision").

In October 1992, NAS submitted a formal "proposal" to NIH for funding of the Guide revision. To avoid the "difficulty of preparing and administering contracts," C.A. App. 384 — *e.g.*, being forced to subject the proposal to competitive bidding — NAS styled its proposal as a "grant" request, which is not subject to the federal acquisition regulations that ordinarily apply to federal contracts. *See* 48 C.F.R. § 2501 *et*

seq. The grant application, which sought more than $ 400,000 in federal funds, provided that an "NRC-appointed committee composed of 15 members will meet approximately five times, and develop the 7th Edition of the Guide," and that the Committee's recommendations to federal agencies will "assure consistency with major changes in animal welfare regulations, consider developing guidelines for the use of farm animals in research, and recommend those animal care issues in which research is needed to provide definitive recommendations." C.A. App. 114-15.

In August 1993, NIH formally approved NAS's proposal and agreed to pay $ 180,000 for the first year of the project. C.A. App. 141. The following year, NIH awarded a "continuation grant," also for $ 180,000. C.A. App. 149. Other federal agencies, including USDA, contributed additional funding. C.A. App. 422-47.

d. One month after the grant was awarded, NAS asked fifteen individuals to become members of the "Committee to Revise the Guide for the Care and Use of Laboratory Animals," which, the prospective members were told, "*serves as the basis for policy on research animal care and use for all federal agencies,*" and is used "by regulators in development of federal standards on research animal care and use." C.A. App. 143 (emphasis added). The majority of Committee members are "scientists of national stature who use animals in their research," — *i.e.*, they are individuals who must comply with the very federal standards they were being asked to develop. C.A. App. 117.

In January 1994, NAS informed the public that the "National Institutes of Health and other federal sponsors *have asked that a committee be appointed to revise the Guide* . . .." C.A. App. 69 (emphasis added). Nevertheless, despite requests by respondents that the Committee's meetings be open to the

public, the Committee denied access to the meetings at which it deliberated on, and devised, its recommendations for the care and use of animals in research — meetings which, if the Committee were subject to FACA, would have been open to the public under section 10(a)(1) of the Act.

The federal government and NAS also refused to provide respondents and other members of the public with transcripts or minutes of Committee meetings, or with other "record[s] prepared for or by" the Committee, as required by section 10(b) of FACA. Accordingly, respondents filed this lawsuit against HHS and other federal agencies which use the Guide. Respondents sought declaratory and injunctive relief on the grounds that the Committee was subject to FACA, either because it was "established" or because it was "utilized" by federal agencies. 5 U.S.C. App. II § 3(2).

5. Proceedings Below

After their FACA claim was rejected in the district court, respondents appealed. A panel of the Court of Appeals (Judges Silberman, Ginsburg, and Sentelle) reversed, ruling unanimously that "under *Public Citizen*, the Guide Committee must be regarded as utilized by HHS because it relies on the Committee's work product and because it was formed by the NAS, a quasi-public entity." Petitioner's Appendix ("Pet. App.") at 14a.[3]

Writing for the Court, Judge Silberman first noted that the Committee is plainly covered by the ordinary meaning of the word "utilized," since "[i]t is quite obvious that the Committee was and is *used* by HHS . . .." Pet. App. at 5a (emphasis in original). Judge Silberman further explained that,

[3] In the Court of Appeals, respondents did not press their argument that the Committee was also "established" by federal agencies.

although the "term 'utilized' was given a very narrow interpretation by the Supreme Court in *Public Citizen*," the "Court indicated quite explicitly in an extensive discussion . . . that advisory committees formed by the NAS were precisely the sort of advisory committees that would be covered by the Act." *Id.* In particular, he highlighted the language from *Public Citizen* that "NAS Committees were the 'paradigmatic example'" of "utilized" committees because the "NAS is a 'quasi-public organization in receipt of public funds.'" Pet. App. at 7a, quoting *Public Citizen*, 491 U.S. at 460.

In addition to noting the "repeated[]" references to NAS committees in *Public Citizen*, Pet. App. at 7a, the D.C. Circuit reasoned that this Court's controlling *test* for "utilized" committees applies squarely to the Guide Revision Committee. Thus, in response to defendants' contention that the references to NAS were only dicta, the Court of Appeals stressed that "[w]hat is part of the holding" in *Public Citizen*

> is its conclusion that by employing the term 'utilized,' in addition to 'established,' Congress had in mind *an extension of the Act's coverage to include the offspring of 'quasi-public' organizations 'permeated by the Federal government.'* After all, that is the only sort of advisory committee the Court recognized as reached by the term 'utilized.' Unfortunately for appellees, *they are not able to point to any other organization that fits this category more readily.*

Pet. App. at 10a (emphasis added).

The Court of Appeals denied the government's and NAS's petitions for rehearing and suggestions for rehearing *en banc*. In concurring in the denial of *en banc* review, Judge Silberman emphasized that *Public Citizen*'s discussion of committees created by quasi-public organizations for federal agencies

constitutes the "core logic of the Court's effort to determine the meaning of the word 'utilize' as used in FACA." Pet. App. at 40a. While NAS has petitioned for review here, the federal government has declined to do so.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' HOLDING AFFECTS ONLY ONE ORGANIZATION AND THAT ORGANIZATION HAS NOT EVEN ATTEMPTED TO COMPLY WITH FACA BEFORE SEEKING REVIEW IN THIS COURT.

NAS suggests several reasons why the Court should grant review. Before rebutting those arguments, however, it is important to stress why this is a particularly inappropriate case for review by this Court.

To begin with, NAS acknowledges that there is no conflict in the Circuits either regarding FACA's applicability to NAS committees or, more important, with respect to the general question of how the word "utilized" should be construed. Pet. at 9. Thus, if review were granted, the Court would, in essence, be deciding on the legal status under FACA of committees formed for the use of federal agencies by only *one* entity — NAS.[4]

Therefore, NAS's assertion that the ruling below "will lead to extensive and burdensome litigation on the status of many different organizations and their relationship to the government," Pet. at 16, is not only wrong but misses the whole point of the D.C. Circuit's ruling. The Court of Appeals' determination that NAS is a "quasi-public" entity *for FACA*

[4] In addition, not all NAS committees are affected by the D.C. Circuit's ruling. NAS committees formed for Congress, for state or local agencies, or for private organizations are unaffected by the decision.

purposes was based on a narrow "set of qualities" that *this* Court "thought critical" in *Public Citizen* — a "set of qualities" that virtually defines NAS and NAS alone. Pet. App. at 10a.

Thus, under *Public Citizen* and the ruling below, a "quasi-public" organization for FACA purposes is one which "was formed *'for the explicit purpose of furnishing advice to the Government.'* " Pet. App. at 10a, quoting 491 U.S. at 460 n. 11 (emphasis added). NAS meets this definition because, as noted above, it is *mandated* by Congress to respond to requests by federal agencies for advice and recommendations. *See* 36 U.S.C. § 253. Tellingly, although pressed by both respondents and the Court of Appeals, NAS and the government have failed to point to a single *"purely private"* organization which is, or could be, subject to a Congressionally-imposed duty to furnish advice at the government's request. 491 U.S. at 460 (emphasis added).

In other words, it is precisely this "unique" and "special" role played by NAS — and trumpeted by it in its own publications and in its petition to this Court, *see supra* at 5-7 — that sets it apart from other organizations whose status under FACA is simply not implicated by the decision below. At core, at least as resolved by the D.C. Circuit, this case is essentially about one organization's status under one open government statute. Especially in light of the narrow nature of the decision below, NAS cannot demonstrate that review is necessary to resolve an important question of federal law.

Moreover, even if this case had more widespread legal significance, NAS's petition greatly overstates the difficulty of compliance with FACA's procedural requirements. Indeed, NAS and the federal agencies which rely on it have yet to *attempt* to comply with FACA's public access requirements —

requirements with which hundreds of other influential expert advisory committees manage to comply each year with little difficulty. *See* President's FACA Report at 1 (indicating that *948* advisory committees complied with FACA during fiscal year 1995).

Thus, while NAS's petition is filled with alarmist rhetoric about the evils that will occur if "NAS were forced to open its deliberations," Pet. at 22, that stance is based entirely on self-serving surmise and supposition, not on any concrete effort to actually comply with FACA's elementary procedures. Moreover, as the district court noted in this case in the course of making a factual finding that NAS "would suffer minimal harm at most" if the Committee at issue were required to comply with FACA:

> Decision-making bodies, whether located in the public or private sector, invariably object to the presence of outsiders and complain about restrictions on open discussion and uninhibited statements of views. *In practice those fears are rarely well founded.* There is nothing in the record to suggest that confidential or proprietary information will be disclosed if plaintiffs attend . . . *In short, the Court sees at most some minor logistical inconvenience to be suffered by the defendants, and here I am referring to perhaps making arrangements to ensure adequate seating.*

C.A. App. 331 (emphasis added). The district court further found that the "public interest would be furthered by the public's attendance at and observation of the committee's analysis and discussion and consideration of these very important issues," and, moreover, that "public scrutiny is particularly important and gives credibility and legitimacy to the ultimate conclusions which will be reached by the Guide Revi-

sion Committee." C.A. App. 330, 332.[5]

In light of those findings, NAS should at least attempt to comply with FACA before it seeks review in this Court on the grounds that such compliance will invariably harm the "*government's* ability to obtain valuable, independent advice from NAS," Pet. at 21 (emphasis added) — particularly when the government itself has not sought review of the D.C. Circuit's ruling on that or any other basis. Indeed, contrary to NAS's petition, the President has recently reaffirmed FACA's basic assumption that a modicum of public access and accountability makes governmental advisory bodies *more*, rather than less, valuable to federal agencies and the public. *See* President's FACA Report at 1.[6]

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[5] The district court made those findings in the course of ruling on plaintiffs' motion for a preliminary injunction. While concluding that a balancing of the equities and the public interest favored the issuance of an injunction, the district court denied that relief solely because of its "reluctant[]" conclusion that plaintiffs were not likely to prevail on the merits. C.A. App. 332.

[6] NAS is also wrong in suggesting that "[a]ll future cases raising the applicability of FACA to specific NAS committees" will necessarily be brought in the District of Columbia, thus foreclosing any possibility of a Circuit conflict. Pet. at 9. Organizations and individuals who reside elsewhere may well, for reasons of convenience and cost, bring suit in other Circuits against federal officials who rely on NAS committees, as they would be permitted to do under the relevant venue provision, 28 U.S.C. § 1391(e).

II. THE DECISION BELOW FAITHFULLY FOLLOWED THIS COURT'S RULING IN *PUBLIC CITIZEN* AND NAS HAS PROVIDED NO COMPELLING REASON WHY THAT RULING SHOULD BE DISREGARDED.

NAS devotes most of its petition to arguing why, in its view, the Court of Appeals was wrong on the merits, rather than explaining why a case of statutory construction affecting one organization is sufficiently significant to warrant this Court's review. Pet. at 9-16. In any event, NAS's attack on the ruling below is utterly misplaced, since the D.C. Circuit merely applied this Court's own construction of the word "utilized" in *Public Citizen*.

As noted above, *Public Citizen* engaged in a detailed "consideration of FACA's purposes and origins," and paid "[c]lose attention to FACA's history" in an effort to "ascertain the intended scope of the term 'utilize'" — the precise legal question at issue here. 491 U.S. at 455, 456. Based on that "careful review," *id.* at 464, the Court concluded that a committee is "utilized" when it is "*formed indirectly by quasi-public organizations such as the National Academy of Sciences 'for' public agencies* as well as 'by' such agencies themselves." *Id.* at 462 (emphasis added).

Moreover, at each step of its detailed analysis of the "indicators of Congressional intent," 491 U.S. at 455, the Court expressly referred to NAS committees to define the very characteristics of "utilized" advisory bodies that were *not* shared by the ABA Committee. For example, the Court stated that:

> — "*the [1970 House] Report's paradigmatic example of a committee "utilized" by an agency* for purposes of Executive Order No. 11007 was an advisory committee established by a quasi-public organization

in receipt of public funds, such as the National Academy of Sciences.'' *Id.* at 460 (emphasis added);

— '' '*The National Academy of Sciences was created by Congress as a semi-private organization for the explicit purpose of furnishing advice to the Government.* This is done by the use of advisory committees.' '' *Id.* at 460 n. 11, quoting 1970 House Report (emphasis added);

— ''*the examples the Senate Report offers [including] . . . 'advisory councils to the National Institutes of Health and committees of the national academies where they are utilized and officially recognized as advisory to the President, to an agency, or to a Government official,' ibid.* — are limited to groups organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status.'' 491 U.S. at 461, quoting S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972) (emphasis added);

— ''The phrase 'or utilized' therefore appears to have been added simply to clarify that *FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences 'for' public agencies as well as 'by' such agencies themselves.*'' 491 U.S. at 462 (emphasis added);

— ''Read in this way, the term 'utilized' would meet the concerns of the authors of House Report No. 91-1731 that advisory committees covered by Executive Order No. 11007, because they were '*utilized by a department or agency in the same manner as a Government-formed advisory committee' — such as the groups organized by the National Academy of Sciences and its affiliates which the Report discussed — would be subject to FACA's requirements.*'' *Id.* at 462-63 (emphasis added).

As these passages demonstrate, this Court *defined* "utilized" committees as those formed for the use of a federal agency "by some semi-private entity the Federal Government helped bring into being." *Id.* at 463. Since NAS is indeed the "paradigmatic" example of such a "semi-private entity," *id.* at 460 — as this Court used that term in *Public Citizen* — the D.C. Circuit's decision was the only possible outcome faithful to this Court's controlling statutory construction.

Put differently, this Court cannot reverse the Court of Appeals' decision without adopting a construction of the word "utilized" which departs sharply from the interpretive approach taken in *Public Citizen* and which is at odds with the Court's own prior reading of FACA's legislative history and purposes. Indeed, NAS appears to recognize as much, since it suggests that the Court engage in exactly the form of statutory analysis which this Court declined to pursue in *Public Citizen* — *i.e.*, that the Court accord the word "utilize" its "plain meaning" and that "[i]t is this meaning that should guide the interpretation of the statute." Pet. at 10; *compare Public Citizen*, 491 U.S. at 453 (declining to adopt a "straightforward reading" of the word "utilize").

Other than its disagreement with the outcome in this particular case, NAS has suggested no "compelling justification" for the Court to revisit and overrule its prior construction of FACA. *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991), quoting *Paterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). The Court has repeatedly stressed that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Id.*

But even if the Court were to jettison *Public Citizen*'s narrow reading of "utilized" in favor of the more expansive, "plain meaning of the statutory language," Pet. at 10, that would hardly change the outcome here. Indeed, NAS acknowledges that the word "utilize" is "synonymous with the verb 'use,'" Pet. at 10, quoting *Webster's Third New International Dictionary* 2525 (1993), and, as the D.C. Circuit observed, "[i]t is quite obvious that the Committee was and is *used* by HHS." Pet. App. at 5a (emphasis in original). Moreover, any notion that the federal defendants did not "use" the Committee is belied by NAS's own press release, issued at the time of the Committee's formation, which specifically announced that "*federal sponsors have asked that a committee be appointed* to review the *Guide for the Care and Use of Laboratory Animals (Guide)*." C.A. App. 69 (emphasis added).[7]

In addition, even if the Court were "examining the plain meaning of the statutory language" afresh, Pet. at 10, it would focus on the critical fact that FACA *expressly* excludes several specific advisory bodies from the statute's requirements, including the "Commission on Government Procurement," "any committee which is composed wholly of full-time officers or employees of the Federal Government," committees "utilized by [] the Central Intelligence Agency," and committees "utilized by [] the Federal Reserve System." 5 U.S.C. App. II §§ 3(2), 4(b). But, although Congress certainly knew

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[7] In contrast, NAS's tortuous reasoning that the words "utilize" or "use" are somehow synonymous with "actual control" of the advisory body, Pet. at 10, has no basis in the statutory language, which merely requires that an agency "utiliz[e]" a committee "*in the interest of obtaining advice or recommendations*," 5 U.S.C. App. II § 3(2) — which is precisely what occurred here. Moreover, under NAS's anomalous approach, no advisory committee would ever be "utilized" because FACA forbids federal agencies from *controlling* advisory committee deliberations precisely so that the committees can produce independent advice. *See supra* at 3.

how to exempt specific advisory committees from the statute's requirements, it did not do so for NAS committees — a fact which, under "cardinal rule[s] of statutory construction," Pet. at 9, overwhelmingly supports the conclusion that no such exception was intended. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 109 (1980) ("If Congress had intended to exclude FOIA disclosures from § 6(b)(1) [of the Consumer Product Safety Act] it could easily have done so explicitly in this section as it did with respect to the other listed exceptions.").

There is likewise no substance to NAS's assertion that *Public Citizen*'s analysis of FACA's legislative history overlooked crucial materials. Pet. at 11-14. In fact, throughout this lengthy litigation, NAS has not cited even one sentence regarding NAS in a House, Senate, or Conference report which *Public Citizen* did not address in its extensive discussion of FACA's background and purposes.[8]

Instead, as below, defendants can cite only to an isolated comment on the House floor which would be entitled to little, if any, weight under any circumstances. *See Bath Iron Workers v. Director, Office of Workers' Compensation Programs*, 506 U.S. 153, 166 (1993) ("we give no weight to a single reference

[8] As noted above, *Public Citizen's* analysis of FACA's legislative history was based largely on an *amicus* brief. *See supra* at n. 2. That brief argued at length that the phrase "or utilized" was intended to cover NAS committees, but it also specifically informed the Court about a district court opinion which had read FACA's legislative history differently to reach the opposite "hold[ing] that a[n] NAS committee was *not* subject to FACA . . .." Pet. App. at 9a (emphasis in original), citing *Lombardo v. Handler*, 397 F. Supp. 792, 799 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977). Therefore, contrary to NAS's assertion, Pet. at 14, the D.C. Circuit was plainly justified in "presum[ing]" that this Court was aware of all of the pertinent case law and legislative history when it adopted its controlling construction of "or utilized." Pet. App. at 9a.

by a single Senator during floor debate''). In fact, the statement of Rep. Hollifield quoted by NAS is far more obscure than the report language cited in *Public Citizen*, and it certainly does not say that NAS *committees* could avoid FACA's requirements — an exemption which appears nowhere in the statute itself.

Rather, the most that this remark signifies is that one member of Congress did not believe that NAS *itself* would be subject to FACA. *See* 118 Cong. Rec. 31421 (1972). Crucially, however, *Public Citizen* does not say, nor have respondents ever argued, that *NAS* is an advisory committee that is subject to FACA whenever it enters into an arrangement with a federal agency. Rather, respondents are relying on the far narrower proposition announced by this Court — and not undercut by any legislative history cited by NAS — that, when NAS forms an advisory committee ''for'' a federal agency, that committee is ''utilized'' within the meaning of FACA. *See* 491 U.S. at 462.

This analysis also answers NAS's assertion that the Committee at issue is not covered by FACA because it was ''established pursuant to a contractual relationship . . ..'' Pet. at 12-13. FACA itself alludes to no such exception, and even the legislative history cited by the Academy in no way suggests that committees formed by government contractors *for* federal agencies are somehow immune from FACA's requirements; indeed, if they were, then *every* advisory committee could circumvent the statute merely by signing a ''contract'' with the agency. And, even if such a gaping loophole in the statute had been created, it has nothing to do with this case, in which NAS purposefully avoided the competitive bidding and other requirements applicable to government contracts. *See supra* at 10.

III. NAS HAS PROFFERED NO OTHER PERSUASIVE REASON FOR THIS COURT TO GRANT REVIEW.

None of the additional reasons NAS urges as a basis for review has any merit. First, NAS argues that it would not be "fair" if the Court were to deny review because NAS has not had an "opportunity to litigate its status under FACA." *Id.* at 1617. It is certainly debatable whether NAS — many of whose committees fall squarely within the ordinary meaning of the word "utilize" — had ample reason to at least file an *amicus* brief in *Public Citizen*, a case whose outcome "depended entirely on the meaning" of that "one word." Pet. App. at 6a.

In any event, NAS offers no pertinent authority for the novel suggestion that a party cannot be affected by this Court's (or, for that matter, any court's) construction of a federal statute unless the party participated directly in the litigation in which that construction was adopted. To the contrary, virtually every case in which the Court interprets a federal law affects organizations and persons who are not before the Court and, indeed, organizations and persons who may have no awareness of the case whatsoever.

Moreover, NAS has now had a full and fair opportunity to argue in the lower courts that this Court's *test* for "utilized" committees — *i.e.*, that such entities include committees created by a "quasi-public" organization "for" a federal agency — does not apply to the Committee at issue. The fact that NAS *lost* because the Committee does indeed have the precise characteristics which *Public Citizen* identified as pertinent to application of FACA hardly means that NAS has been deprived of its "basic right to be heard." Pet. at 20.

Second, NAS stresses the enormous influence that its committees have had on a "myriad" of issues of "national importance." Pet. at 8, 20-22. But, as recognized by the district court here, *see supra* at 16, this simply highlights the importance of ***ensuring*** that NAS committees comply with FACA's provisions for public access and accountability.

In this case, for example, federal agencies largely delegated to an NAS committee their authority under federal law to promulgate binding federal standards for the treatment of animals in laboratories throughout the nation. *See* Pet. App. at 2a (noting that HHS regulations "actually require that institutions funded by [NIH] follow the most recent version of the Guide"). Yet, despite the Committee's vast influence on government policy — and its expenditure of nearly $400,000 in public funds — the public was denied the opportunity to see, through access to meetings and documents, ***how*** the committee arrived at these regulatory standards.

In short, this surely *is* the "paradigmatic" FACA arrangement, not only because this Court said so, but because it implicates the core purposes of FACA. Conversely, defendants' policy argument that applying FACA to NAS committees will impair the government's ability to obtain "independent advice" from NAS, Pet. at 21, flies in the face of FACA itself, which, as noted above, demands that agencies ***not*** "inappropriately influence[]" advisory committees, and instead requires that any recommendations be the "***result of the advisory committee's independent judgment.***" 5 U.S.C. App. II § 5(b)(3) (emphasis added). Plainly, if such bodies as the Advisory Committee on Human Radiation Experiments, the Defense Base Closure and Realignment Commission, and the Bipartisan Commission on Entitlement Reform could manage to provide valuable advice while complying with FACA's openness requirements, *see* President's FACA Report at 4, there is no

reason why an NAS Committee which advises federal agencies on the treatment of laboratory animals could not do so as well.

Nor is there any substance to NAS's assertion that FACA compliance would compel NAS to "relinquish control of its own committees to Government officials." Pet. at 22. As made clear in *Public Citizen*, NAS may continue to form and manage committees "for" federal agencies, so long as they meet the minimum public access and accountability requirements with which thousands of other influential advisory committees have complied.[9]

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[9] Contrary to NAS's warnings, there is no evidence that the panel ruling is having an "adverse impact" on NAS's operations. Pet. at 21. So far as respondents are aware, only one lawsuit has been filed since the Court of Appeals' ruling, and that case merely demonstrates the ability of district court judges to craft suitable relief for FACA violations.

In *Natural Resources Defense Council v. Curtis*, Civ. No. 97-308 (PLF) (D.D.C. Mar. 5, 1997), the plaintiffs requested preliminary injunctive relief with regard to an NAS committee formed to advise the Department of Energy on the start-up of a billion dollar facility. That committee largely met in secret and had members who had received compensation from the national laborory where the project would be built. Finding that there is a "strong public interest in the enforcement of FACA [and] in assuring that the government abides by the disclosure rules contained in the statute," the district court enjoined DOE from "utilizing" the committee's work. *Id.* at 3. At the same time, to ensure that its injunction did not impair any First Amendment rights of the committee members, the Court refused to enjoin NAS from releasing the report, meeting or otherwise continuing to function.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL ACADEMY OF SCIENCES, PETITIONER

v.

ANIMAL LEGAL DEFENSE FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a committee established by the National Academy of Sciences was "utilized" by a federal agency, within the meaning of the Federal Advisory Committee Act, 5 U.S.C. App. § 1 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-208

NATIONAL ACADEMY OF SCIENCES, PETITIONER

v.

ANIMAL LEGAL DEFENSE FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 104 F.3d 424. The opinions on denial of rehearing en banc (Pet. App. 37a-41a) are reported at 114 F.3d 1209. The opinion and order of the district court (Pet. App. 15a-36a) are unreported. The prior decision of the court of appeals is reported at 53 F.3d 363.

JURISDICTION

The court of appeals entered its judgment on January 10, 1997. A petition for rehearing was denied on May 6, 1997. Pet. App. 37a. The National Academy

of Sciences filed a petition for a writ of certiorari on August 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Advisory Committee Act (FACA), 5 U.S.C. App. § 1 *et seq.*, regulates committees providing group advice to the Executive Branch. FACA defines an "advisory committee," in part, as:

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof * * *, which is —
>
> (A) established by statute or reorganization plan, or
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> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government * * *.

5 U.S.C. App. § 3(2).

If an agency "establishe[s] or utilize[s]" an advisory committee, the agency must file a charter setting forth the committee's objectives and the scope of its activities. 5 U.S.C. App. § 9(c). In addition, the agency must provide advance notice in the Federal Register of committee meetings, keep minutes of each meeting, and make committee records available to the public in accordance with the Freedom of Information Act, 5 U.S.C. 552. 5 U.S.C. App. § 10(a)(2), (b) and (c). Committee meetings must be open to the public, unless one of the exceptions

enumerated in the Government in the Sunshine Act, 5 U.S.C. 552b(c), applies. 5 U.S.C. App. § 10(a)(1) and (d). A federal officer must preside over or attend every committee meeting. 5 U.S.C. App. § 10(e). Prior to any meeting, the federal officer must approve the scheduling and agenda of the meeting. 5 U.S.C. App. § 10(f). See generally 41 C.F.R. 101-6.1001 to 101-6.1035.

2. Pursuant to the Animal Welfare Act, 7 U.S.C. 2131 *et seq.*, the Department of Agriculture promulgates nationwide standards for the treatment of animals in all research facilities. The regulations promulgated by the Department of Agriculture establish the minimum requirements for laboratory animal welfare. See 7 U.S.C. 2143(a)(2); 9 C.F.R. 1.1 to 4.11. Those regulations refer to some of the recommendations of the National Academy of Science's "Guide for the Care and Use of Laboratory Animals" (Guide). See Pet. App. 2a; 56 Fed. Reg. 6428 (1991).

Although the Department of Health and Human Services (HHS) does not administer the Animal Welfare Act, HHS does provide federal funding, through contracts and grants, for biomedical and behavioral research. 42 U.S.C. 284, 287, 287a. HHS requires all research facilities receiving HHS funding to abide by both the Department of Agriculture's Animal Welfare Act regulations and additional HHS guidelines regarding the treatment of laboratory animals. 42 U.S.C. 289d; 48 C.F.R. PHS 352.280-2, 380.201 to 380.206. HHS has adopted the Guide as a major component of its animal welfare regulations. See, *e.g.*, 48 C.F.R. PHS 380.205(a)(1) and (c); see also Pet. App. 2a.

The Interagency Research Animal Committee, which is composed of representatives from each federal agency that uses animals in research, issues a

government-wide publication known as the *Principles for the Utilization and Care of Vertebrate Animals Used in Testing, Research and Training.* Pet. App. 2a. That publication also refers readers to the Guide as an "aid to the interpretation and execution of the *Principles.*" *Ibid.*

3. The National Academy of Sciences was chartered by Congress in 1863. See 36 U.S.C. 251, 1101. The federal government has no seats on the Academy's governing board and has no voice in choosing the Academy's officers or in appointing the members of its committees. Academy officers and employees are not persons holding employment or appointment by the United States.

According to its charter, the Academy "shall, whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art." 36 U.S.C. 253. Pursuant to that provision, the Academy is frequently called upon by federal agencies to perform studies and investigations. Pet. 1-2; Pet. App. 32a (Academy receives approximately 65% of its funds from projects funded by the federal government). The Academy receives no federal funding or compensation beyond payments for its services pursuant to government procurement contracts, grants, or cooperative agreements. See 36 U.S.C. 253; C.A. App. 181. In addition to its substantial work for the federal government, the Academy does some studies for state governmental agencies and private entities and undertakes projects on its own initiative. *Lombardo* v. *Handler*, 397 F. Supp. 792, 794-795 (D.D.C. 1975), aff'd, 546 F.2d 1043 (D.C. Cir. 1976) (Table), cert. denied, 431 U.S. 932 (1977).

The Academy's principal operating arm is the National Research Council (Research Council). One subcomponent of the Research Council is the Institute of Laboratory Animal Resources (Institute). The Academy's Research Council and the Institute produce the "Guide for the Care and Use of Laboratory Animals." Pet. App. 2a.

4. The Academy's efforts to revise the Guide underlie the present litigation. In 1991, the Institute first considered revising the Guide. The Academy convened a meeting at which Academy members, scientists, and representatives of six federal agencies unanimously agreed that the Guide should be revised. Pet. App. 3a, 16a-17a. The Academy subsequently submitted a grant application to HHS seeking funding for a revision of the Guide. The proposal indicated that a committee would be formed to revise the Guide (Revision Committee). HHS subsequently authorized the grant, and the Academy selected a group of fifteen people to serve on the committee. *Id.* at 17a.[1]

5. In May 1994, the Animal Legal Defense Fund, Psychologists for the Ethical Treatment of Animals, and the Association of Veterinarians for Animal Rights (collectively, the Fund) filed suit against HHS alleging that the Academy's Revision Committee is an "advisory committee" subject to FACA. Pet. App. 17a-18a. The Academy subsequently intervened in the action as a co-defendant. *Id.* at 18a. The Fund's motion for a preliminary injunction to halt the Revision Committee's meetings was denied by the district

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[1] One individual, Kathryn Bayne, D.V.M., Ph.D., was invited by the Academy to serve on the Revision Committee while she was an employee of HHS. Dr. Bayne left federal employment in May 1994. C.A. App. 326-327.

court. The court of appeals dismissed the Fund's appeal of the denial of a preliminary injunction as moot after the Revision Committee concluded its last meeting. *Id.* at 3a; *Animal Legal Defense Fund* v. *Shalala*, 53 F.3d 363 (D.C. Cir. 1995).[2]

The district court granted summary judgment in favor of the federal agencies and the Academy, holding that the agencies neither "established" nor "utilized" the Revision Committee, within the meaning of FACA. Pet. App. 15a-36a. The court of appeals reversed. *Id.* at 1a-14a. The court of appeals held that, when a committee is established by a "quasi-public" entity and receives federal funds, and when an agency uses the committee's work product, it is subject to FACA regardless of whether the agency requested committee advice or managed and controlled the committee *Id.* at 7a-14a. The court of appeals relied heavily on this Court's decision in *Pubiic Citizen* v. *Department of Justice*, 491 U.S. 440 (1989).

Both the Academy and the federal agencies filed petitions for rehearing and suggestions of rehearing en banc, which the court of appeals denied. Pet. App. 37a-39a. The author of the panel opinion, Judge Silberman, explained in an opinion concurring in the denial of rehearing en banc that some of the Academy's concerns about FACA's requirements (such as the duty to ensure that committee membership is fairly balanced) were misplaced, because not all of FACA's obligations apply to committees "utilized," but not "established," by a federal agency. *Id.* at 41a

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[2] Upon remand, the Department of Agriculture was added as a defendant. Gov't C.A. Br. 21 n.6 (quoting 10/25/94 Tr. 46 (C.A. App. 318)).

n.1. Judge Wald and Judge Tatel dissented from the denial of rehearing en banc. *Id.* at 41a.

ARGUMENT

The federal respondents disagree with the court of appeals' decision in this case and share many of petitioner's objections to the court's reasoning. Nevertheless, because (i) the court of appeals' decision was guided by its understanding of this Court's statements regarding the Academy's status in *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989), (ii) the facts of this case do not present the most typical interaction of Academy committees with federal agencies, and (iii) the implications of the court of appeals' ruling for the federal government's and the Academy's operations cannot yet be fully assessed, review by this Court is not warranted at this time.

1. The federal respondents, like petitioner, believe that the decision of the court of appeals is erroneous. In *Public Citizen*, this Court held that the President and the Justice Department did not "utilize" the American Bar Association's Standing Committee on the Federal Judiciary (ABA Committee), within the meaning of FACA, in making judicial appointments. See 491 U.S. at 452-467. The Court concluded that a literal interpretation of the term "utilized" would extend FACA far beyond the scope intended by Congress, and thus rejected the argument that an agency "utilizes" a committee whenever it "makes use of" its work or recommendations. *Id.* at 452. Instead, the Court looked to whether the committee had been formed "at the Federal Government's prompting," received federal funds, and was "amenable to strict management by agency officials." *Id.* at 457-458.

In this case, the Revision Committee of the National Academy of Sciences was not formed "at the Federal Government's prompting." *Public Citizen*, 491 U.S. at 457. To the contrary, the Academy independently and of its own initiative chose to revise the Guide through use of a committee process. See Pet. App. 3a, 16a-17a, 23a. Nor was the Revision Committee subjected to "strict management by agency officials." *Id.* at 5a ("It is indisputable that no government agency could be thought to exercise that degree of influence over the Guide Committee."). Finally, the only federal funding provided the Revision Committee came in the form of a grant to the National Academy of Sciences. *Id.* at 3a. FACA, however, does not apply to advice provided pursuant to a government contract. See *Food Chemical News* v. *Young*, 900 F.2d 328 (D.C. Cir.) (FACA does not apply to private government contractor), cert. denied, 498 U.S. 846 (1990).

2. Notwithstanding the considerations just discussed that weigh against a holding that federal agencies "utilized" the Revision Committee, we do not urge the Court to grant review.

a. The court of appeals considered itself bound by this Court's prior statements regarding the Academy's status in *Public Citizen*. See Pet. App. 5a-7a, 8a ("[W]e are in no position, hierarchically, to reject the [Supreme] Court's approach."), 10a. In *Public Citizen*, this Court repeatedly contrasted the ABA Committee with committees created by the Academy, which the Court characterized as the "paradigmatic example of a committee 'utilized' by an agency." 491

U.S. at 460.[3] The Court noted that such committees, unlike the ABA Committee, were "established by a quasi-public organization in receipt of public funds." *Ibid.* The Court then quoted a passage from a House Report that was prepared prior to the Congress in which FACA was enacted, which stated that "[a] great number" of Academy committees "possibly should be added to" the list of then-existing advisory committees because "the [Academy] committees fall within the intent and literal definition of advisory committees under Executive Order 11007." *Id.* at 460 n.11 (quoting H.R. Rep. No. 1731, 91st Cong., 2d Sess. 15 (1970)). Executive Order No. 11,007 (3 C.F.R. 573 (1959-1963)), to which the House Report referred, governed the operation of advisory committees prior to FACA's enactment and served as the lodestar in the Court's opinion for articulating when an agency "utilizes" a committee within the meaning of FACA. See, *e.g.*, *Public Citizen*, 491 U.S. at 457.[4]

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[3] The Academy, however, was not a party to the *Public Citizen* case, and the Court's statements were made without the benefit of full briefing on the Academy's status.

[4] As the earlier House Report observed, most Academy committees were not reported by federal agencies as advisory committees under Executive Order No. 11,007. See 491 U.S. at 460 n.11 (quoting H.R. Rep. No. 1731, *supra*, at 15). To the extent that the definition of an advisory committee in FACA was intended to incorporate the scope of Executive Order No. 11,007 (see 491 U.S. at 457, 460, 462-463), the practice under that Order cuts against finding that Academy committees are covered by FACA.

Public Citizen also noted that the Senate Report on the Senate version of the FACA bill described the committees that would have been covered, beyond those established by an agency, as "groups organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status," such as

Public Citizen also discussed the lack of evidence in the Conference Report that private groups should be swept within FACA's terms, in contrast to committees "formed * * * by quasi-public organizations whose opinions the Federal Government sometimes solicits." *Public Citizen*, 491 U.S. at 462. The Court then concluded that

> [t]he phrase "or utilized" therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the [Academy] "for" public agencies as well as "by" such agencies themselves.

Ibid.; see also *id.* at 462-463. That construction of "utilized," the Court continued, would comport with what it found to be the legislative intention to include committees "whether those groups were established by the Executive Branch or by statute or whether they were the offspring of some organization created or permeated by the Federal Government." *Id.* at 463. The Court determined, however, that the ABA Committee was not "utilized" because it was not formed by an agency "or by some semiprivate entity

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"committees of the national academies where they are utilized and officially recognized as advisory to the President, to an agency, or to a Government official." 491 U.S. at 461 (quoting S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972)). The Senate definition was rejected, however, in favor of the House version, which, *inter alia*, was not intended to apply to organizations having a contractual relationship with an agency. H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess. 9-10 (1972); see generally *Lombardo*, 397 F. Supp. at 797-800.

the Federal Government helped bring into being." *Ibid.*[5]

A grant of a writ of certiorari is thus not warranted in this case on the ground that the court of appeals disregarded or failed to apply this Court's precedents. At the same time, we do not believe that the court's discussion of the legislative materials in *Public Citizen* must be read to embrace as broad a group of Academy committees as the court of appeals' decision apparently does. Nevertheless, if this Court continues to believe, in accord with the statements in *Public Citizen*, that a significant number of Academy committees are "utilized" by federal agencies within the meaning of FACA, then review by this Court is unnecessary. Only if this Court were prepared fundamentally to reconsider its statements about the Academy, based on a more complete presentation of the issue than was before the Court in *Public Citizen*, would review be warranted.

b. In a number of ways, moreover, this case is not representative of how federal agencies most commonly interact with the Academy. For that reason, it might not provide the most appropriate vehicle for a full-scale reconsideration of *Public Citizen*'s statements regarding the status of Academy committees under FACA. First, in this case, no agency sought

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[5] The concurring Justices (Justice Kennedy, joined by the Chief Justice and Justice O'Connor) did not dispute the majority's view that the term "utilized" embraced committees "formed indirectly by quasi-public organizations such as the National Academy of Sciences," but would have endorsed a more expansive construction of the term that would have reached the ABA Committee. *Public Citizen*, 491 U.S. at 482. The concurring Justices ultimately agreed with the judgment on constitutional grounds. *Id.* at 482-489.

out the Academy's advice. To the contrary, the Academy approached HHS and the Department of Agriculture with an unsolicited request for a grant to cover the costs of the Revision Committee's work. Pet. App. 17a, 21a-23a. As the Academy's petition notes (Pet. 2, 7-8), the more common practice is for federal agencies affirmatively to call upon the Academy for advice and reports. While the fact that the government agencies did not initiate or seek out the committee's advice in this particular case underscores the erroneousness of the court of appeals' ruling, those circumstances do not arise with sufficient frequency to merit review in their own right.

Petitioner also contends (Pet. 11-13) that Congress did not intend for the term "utilized" to embrace government contracts. We agree with that reading of FACA. See also *Food Chemical News* v. *Young*, *supra*. This case, however, involves a grant agreement, not a government procurement contract. Compare 31 U.S.C. 6303(1) (agency enters into a procurement contract when the "principal purpose" of the funding is to acquire research services "for the direct benefit or use of the United States Government") with 31 U.S.C. 6304(1)-(2) (agency provides a grant when the "principal purpose" of the research is to benefit the general public interest and when "substantial involvement is not expected between the executive agency and the * * * recipient when carrying out the [grant] activity"); see also *Forsham* v. *Harris*, 445 U.S. 169, 180 (1980). Although procurement contracts and grant agreements are similar in many respects and receive similar treatment under some federal laws (see, *e.g.*, *Henke* v. *Department of Commerce*, 83 F.3d 1445, 1449-1453 (D.C. Cir. 1996)), the rules and regulations governing the administra-

tion of grants and procurement contracts are distinct.[6]

c. There is no conflict in the courts of appeals on the standard to be applied in determining generally whether a federal agency has "utilized" a committee within the meaning of FACA. The standard that the D.C. Circuit has applied to identify "utilized" committees, outside the context of Academy committees, is correct and consistent with *Public Citizen*, and has proved workable. See *Washington Legal Found.* v. *United States Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994); *Food Chemical News*, *supra*. Nor is there a circuit conflict on whether a committee established by a federally chartered corporation or "quasi-public" entity is subject to FACA. The decision below is the only court of appeals ruling on that issue thus far. Because the vast majority of FACA litigation and litigation against the Academy arises within the D.C. Circuit, however, the lack of a circuit conflict does not weigh strongly against further review.[7]

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[6] See generally 48 C.F.R. Parts 3, 9, 24, 35, 303, 309, 324 (regulating government contractors); 45 C.F.R. Part 74 (regulating grant recipients).

[7] Unlike *Public Citizen*, 491 U.S. at 465-467, this case presents no important constitutional question that would independently merit this Court's consideration, even in the absence of a circuit conflict. The Academy asserts a potential First Amendment right of association in its petition. Pet. 11 n.4. That argument was not raised below and was not addressed by the court of appeals. Ordinarily, "[i]t is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992).

d. Finally, review by this Court would be premature because the implications of the court of appeals' decision for agency operations have not yet fully crystallized. In response to the government's and the Academy's petitions for rehearing, Judge Silberman indicated that some of FACA's provisions would not apply to Academy committees. See Pet. App. 41a n.1. Further clarification of whether and how FACA's provisions apply to various Academy committees may thus mitigate some of the operational concerns voiced in the Academy's petition (*e.g.*, Pet. 6). For example, petitioner correctly notes (Pet. 21) that, in light of the court of appeals' decision in this case, one district court has enjoined a federal agency from relying upon the work product of an Academy committee. *Natural Resources Defense Council, Inc.* v. *Curtis*, No. 97-0308 (PLF) (D.D.C. Aug. 6, 1997). The government is currently appealing that injunction, however, because it is inconsistent with FACA's language, legislative history, and purpose, and is in conflict with the rulings of almost every court that has addressed the question, including prior decisions of the D.C. Circuit.[8] The practical effects of the court of appeals'

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[8] See, *e.g.*, *National Nutritional Foods Ass'n* v. *Califano*, 603 F.2d 327, 336 (2d Cir. 1979); *Northwest Forest Resource Council* v. *Espy*, 846 F.Supp. 1009, 1014-1015 (D.D.C. 1994); *Center for Auto Safety* v. *Tiemann*, 414 F. Supp. 215, 226 (D.D.C. 1976), aff'd in part and remanded in part, 580 F.2d 689 (D.C. Cir. 1978); see also *California Forestry Ass'n* v. *Forest Service*, 102 F.3d 609, 614 (D.C. Cir. 1996); *American Petroleum Inst.* v. *Costle*, 665 F.2d 1176, 1189-1190 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982); *Metcalf* v. *National Petroleum Council*, 553 F.2d 176, 181 n.53 (D.C. Cir. 1977); cf. *Physicians' Educ. Network, Inc.* v. *Department of Health, Educ. & Welfare*, 653 F.2d 621, 623-624, 626-627 (D.C. Cir. 1981); *Idaho Farm Bureau Federation* v. *Babbitt*, 900 F. Supp. 1349, 1364-

decision thus can be ascertained only as the Academy and federal agencies assess their operating procedures in light of that decision, and as the court of appeals is given the opportunity to clarify the scope and impact of its ruling.

We appreciate and share the Academy's interest in ensuring separation and independence between the Academy and federal agencies and in preserving the integrity of its processes. We do not, however, concur in the Academy's assertion (*e.g.*, Pet. 6-7) that the presence of a government employee at meetings must compromise the quality, independence, or objectivity of the Academy's work. Government scientists and other experts have frequently offered distinguished service to Academy committees, with none of the untoward consequences that the Academy predicts. Indeed, as initially constituted, the committee in this case included an HHS employee. See note 1, *supra*. The Academy also invited six federal agency officials to its first meeting. Pet. App. 17a; see also *id.* at 25a-26a. Petitioner's concerns about the prospective impact of interaction with federal employees on its operations are thus premature.

1367 (D. Idaho 1995). But see *Alabama-Tombigbee Rivers Coalition* v. *Department of Interior*, 26 F.3d 1103 (11th Cir. 1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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RESPONDENTS.

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for the District of Columbia Circuit

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The National Academy of Sciences ("NAS" or "Academy") demonstrated in its petition that the decision of the court below threatens to destroy the very effective means by which the Academy has provided invaluable scientific advice to the government on vital public issues. The force of the NAS' concerns has been reinforced by the Brief *Amici Curiae* in support of the NAS' petition that has been submitted by 84 prominent scientists who have participated in or benefitted from the Academy's activities over the years. In this brief, NAS replies to the oppositions submitted by the federal respondents and by the Animal Legal Defense Fund and its sister organizations (collectively "ALDF").

ARGUMENT

1. The federal respondents state that they "disagree with the court of appeals' decision in this case and share many of petitioner's objections to the court's reasoning." Brief for Federal Respondents in Opposition at 7 ("Fed. Opp."). Nonetheless, they urge the Court to deny review. None of the justifications for denying review can withstand scrutiny.

a. The federal respondents state that "[o]nly if this Court were prepared fundamentally to reconsider its statements about the Academy, based on a more complete presentation of the issue than was before the Court in *Public Citizen*, would review be warranted." *Id.* at 11; *see id.* at 8-11. But it is for exactly this reason that the NAS has filed its petition: the court below believed that it was compelled to rule against the NAS on the basis of this Court's statements about the NAS in a decision in which the NAS was not a participant. Only this Court can provide the NAS with its day in court.

b. The Solicitor General asserts that this case is not representative of how federal agencies most commonly interact with the Academy, citing (1) that the NAS approached the

federal government to support the revision of *The Guide for the Care and Use of Laboratory Animals* (the "*Guide*") and (2) that this case involves a grant rather than a contract. *Id.* at 12-13. But there is no "common" or "standard" means by which the NAS interacts with the government and the instant study is certainly not in any sense unusual.

The considerations cited by the federal respondents do not justify the denial of review. The NAS estimates that approximately 32 percent of the 236 studies that were authorized in 1996 arose from an NAS initiative and some 68 percent arose from an external request. Moreover, the origin of the first contact between the government and the NAS cannot be determinative because the initiation of a study is frequently the product of a complicated interaction between the NAS and potential government sponsors. The accident of who raised the idea of a study first is thus largely irrelevant to the core statutory issue of whether the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. II, applies to NAS committees.

Similarly, while the NAS prepared the *Guide* pursuant to a grant rather than a contract, this fact is of no moment. Approximately 30 percent of the studies initiated with government support in 1996 were pursuant to grants, 59 percent were pursuant to contracts, and 11 percent were pursuant to cooperative agreements. The particular form of the legal relationship in no way affects how the NAS manages its committees or how those committees operate. Congress made plain its intent that the word "utilized" in FACA does not encompass committees established by a government

contractor,[1] and there is no principled reason why the same rule should not apply to committees formed by a grantee. *See Henke v. United States Dep't of Commerce*, 83 F.3d 1445, 1450 (D.C. Cir. 1996) ("grant agreement [with the National Science Foundation] includes the essential elements of a contract and establishes what would commonly be regarded as a contractual relationship between the government and the grantee").[2]

c. The federal respondents also argue that certiorari should be denied because there is no circuit conflict. Fed. Opp. at 13. But, because the vast preponderance of FACA litigation arises in the D.C. Circuit, the federal respondents acknowledge that the absence of a conflict should not weigh strongly against further review. *Id.* Indeed, with the exception of this case, the D.C. Circuit has determined whether a committee is covered by FACA by examining whether the committee is subject to actual management and control by the federal government. *See Washington Legal Found. v. United States Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994); *Food Chemical News*, 900 F.2d at 332-33. This more sensible approach, which should be the universal rule, will continue to govern cases that are not deemed to involve so-called "quasi-public" organizations.

d. The federal respondents claim that review is "premature" because the implications of the court of appeals' decision have not yet "crystallized." Fed. Opp. at 14-15. But

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[1] H.R. Conf. Rep. No. 92-1403, at 10 (1972); *see Food Chemical News v. Young*, 900 F.2d 328, 331 (D.C. Cir.), *cert. denied*, 498 U.S. 846 (1990).

[2] *See also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (federal grant programs are "much in the nature of a contract"); *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985) (same).

the obligations that FACA would impose are both unambiguous and predictable: no one has suggested that NAS can somehow evade FACA's commands governing the role of federal employees in controlling committee meetings (and even determining whether meetings can be held), governing public and governmental access to committee meetings and documents, or even governing administrative burdens such as publishing notices of committee meetings and the like. Judge Silberman, speaking for himself in concurring in the denial of rehearing *en banc*, has suggested only that the NAS might avoid the FACA requirement that committee membership must be "balanced." Pet. App. 41a n.1; *see* FACA §§ 5(b), (c). There thus is no realistic prospect that the mode of operation that the NAS has successfully followed for decades — creating a committee that is independent of the government and subject to NAS supervision and control — can somehow be reconciled with FACA's commands.

Moreover, the federal respondents' observation (Fed. Opp. at 15) that government scientists have frequently offered distinguished service to the NAS is true, but completely irrelevant. There is an obvious distinction between the NAS' engagement of the country's most thoughtful scientists — from government, universities, and industry — on its committees, and a requirement that government employees control those committees.

2. The ALDF's opposition similarly offers a series of unpersuasive arguments for the denial of certiorari.

a. ALDF seeks to diminish the significance of the case by asserting that "NAS should at least attempt to comply with FACA before it seeks review in this Court . . . ." ALDF Opp. at 17. But ALDF recites the various FACA requirements with which the NAS must conform in order to abide by the D.C. Circuit's decision (ALDF Opp. at 2-3) —

and these are exactly the provisions that will predictably and necessarily disrupt NAS' operations. NAS Pet. at 6-7. No point would be served by delay because any accommodation to FACA necessarily must intrude on the way the NAS has found it appropriate to conduct its business. And, most fundamentally, the NAS should not be forced to adapt to FACA because the statute should be found to be inapplicable to it.

ALDF also argues that "this case is essentially about one organization's status under one open government statute." ALDF Opp. at 15. Even if the ALDF were correct in asserting that the D.C. Circuit's decision is confined to the NAS,[3] the consequences of even this application are sufficiently serious as to justify review. *See* Brief *Amici Curiae* Submitted by 84 Prominent Scientists in Support of Petitioner at 8-17. It is telling that ALDF does not dispute the central role that the NAS has played in providing impartial and informed advice on important issues of public policy. *See id.* at 3-7; NAS Pet. at 7-9. It is the adverse impact of the decision below on the preservation of that national resource that justifies review.

b. ALDF argues that the NAS' comments about the errors in the ruling below are misplaced because the court of appeals was allegedly only following this Court's construction of the word "utilized" in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989). ALDF Opp. at 18-23. It is doubtful, however, that this Court

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[3] The decision below invites litigation involving other organizations because, as the D.C. Circuit acknowledged, the term "quasi-public" is largely undefined. Pet. App. 10a. ALDF stresses that the term might be limited to organizations formed to provide advice to the government. ALDF Opp. at 15. But Washington is populated by many organizations that serve exactly that function.

intended in *Public Citizen* to establish the complicated legal structure for the interpretation of the word "utilized" that is advocated by the ALDF and that was accepted by the court of appeals. The word "quasi-public" does not appear in the statute or in the legislative history of FACA, but the court of appeals read *Public Citizen* to establish a special rule governing such organizations. In any event, *Public Citizen* is replete with references to the NAS that reflect the *assumption* that the NAS was sufficiently entangled with the government as to justify the application of FACA to NAS' committees.[4] It is the absence of any real foundation for these observations — and the binding effect that the D.C. Circuit attached to them — that justifies review.

c. ALDF disputes the assertion raised by the NAS that it is fundamentally unfair for the NAS to be bound by dicta in a case in which it had no opportunity to participate. ALDF Opp. at 24-26. First, ALDF chides the NAS for not having had the foresight to file a brief in *Public Citizen*. *Id.* at 24. But, in fact, before *Public Citizen* all three branches shared the understanding that NAS committees were *not* subject to FACA. The Office of Legal Counsel in the Department of Justice provided an opinion to that effect. C.A. App. 171-77. The district court, in a decision affirmed by the D.C. Circuit, reached the same conclusion shortly after FACA's enactment. *Lombardo*, 397 F. Supp. at 797-800. And, the Congress reviewed compliance with FACA in 1976 and even amended the law to overturn a restrictive interpretation of the open-meeting provisions of FACA, but

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[4] ALDF attaches significance to the fact that the NAS charter was enacted by Congress. ALDF Opp. at 5, 15. In fact, at the time of NAS' creation, all corporations in the District of Columbia were created by Congress. *Lombardo v. Handler*, 397 F. Supp. 792, 794 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).

did not indicate any disagreement with *Lombardo*.[5] The NAS thus had absolutely no reason to believe that *Public Citizen* would have any implications for it, much less to anticipate the pointed discussion of NAS that emerged in the Court's opinion.

Second, the ALDF criticizes the NAS for its "novel suggestion" that this case raises fairness issues. ALDF Opp. at 24. But, contrary to ALDF's argument, this case does not involve a general construction of a federal statute. Indeed, as ALDF elsewhere argues (*id.* at 18-20), this Court made particularized statements about the NAS — statements that the court below took to define the meaning of the so-called "quasi-public" "prong" of FACA. Pet. App. 10a-11a. It is the binding consequences of the individualized statements about the NAS in a case in which NAS did not participate that makes the decision below so offensive. *Richards* v. *Jefferson County, Alabama*, __U.S.__, 116 S. Ct. 1761 (1996).

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[5] *See Hearings on S. 2947 and 3013 To Amend the Federal Advisory Committee Act Before the Subcomm. on Reports, Accounting, and Management of the Senate Comm. on Government Operations*, 94th Cong. 838-58 (1976) (setting out full text of *Lombardo*); *id.* at 306 (FDA letter discussing *Lombardo*). Congress chose, however, only to amend FACA in other respects. *See* Pub. L. No. 94-409, § 5(c), 90 Stat. 1241, 1247-48 (1976); H.R. Conf. Rep. No. 94-1441, at 26 (1976) (setting forth reasons for amendment).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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